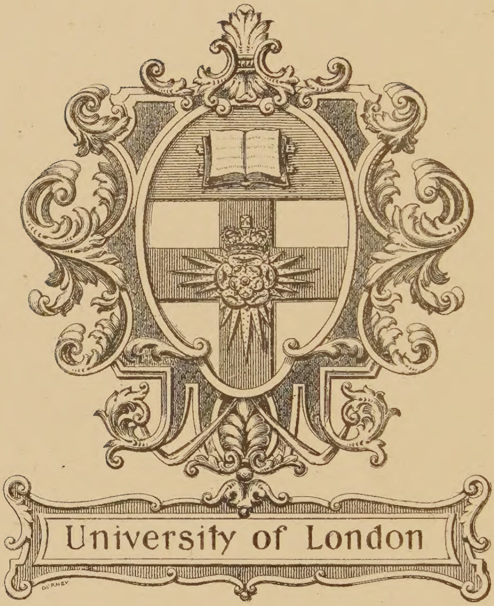
THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

UNIVERSITY OF LONDON LIBRARY

REFERENCE ONLY

346.4
Mx North Gallery



11 JUN 1991

Digitized by the Internet Archive
in 2026

https://archive.org/details/all-england-law-reports-reprint_1937_4

THE
ALL ENGLAND
LAW REPORTS
ANNOTATED

OF CASES DECIDED IN

THE HOUSE OF LORDS. THE PRIVY COUNCIL.
ALL DIVISIONS OF THE SUPREME COURT
AND
COURTS OF SPECIAL JURISDICTION

1937
VOLUME 4

Consulting Editor:
ROLAND BURROWS, K.C.
Recorder of Cambridge
Managing Editor of Halsbury's Laws of England, Hailsham Edition

General Editor:
W. J. WILLIAMS, B.A.,
of Lincoln's Inn, Barrister-at-Law

THE LAW JOURNAL,
37-39 ESSEX STREET, LONDON, W.C.2

BIBL.
LONDIN
UNIV.

These reports are cited thus :

[1937] 4 All E. R.

Printed by Thomas De La Rue & Co., Limited, 110, Bunhill Row, London, E.C.1.

CASES REPORTED IN VOLUME 4

PAGE

Adamson (Joseph) & Co., Collins (Inspector of Taxes) *v.* [K.B.D.] .. 236
Allied Newspapers, Ltd. *v.* Hindsley (Inspector of Taxes) [C.A.] .. 677
Andrew *v.* Coad, *Re* Lawry's Estate [Ch. D.] .. 1
Arjun Lal, Man Singh of Sewai Jaipur (Maharaja) *v.* [P.C.] .. 5
Associated Cinema Properties, Ltd., Wiltshire Bacon Co., Ltd. *v.* [C.A.] .. 80
A.-G. (at the relation of Ormerod Taylor & Son, Ltd.) and Ormerod Taylor & Son, Ltd. *v.* Todmorden Borough Council [K.B.D.] .. 588
Austins of East Ham, Ltd. *v.* Inland Revenue Commissioners [K.B.D.] .. 275
Australasian Temperance and General Mutual Life Assurance Society, Ltd., Mount Albert Borough Council *v.* [P.C.] .. 206
Bankrupt, Trustee in Bankruptcy *v.*, *Re* Bowden (Lady) [C.A.] .. 635
Barburriza & Co., Ltd., Vernazza *v.* [C.A.] .. 364
Barclays Bank, Ltd., *Ex p.* The Trustee *v.*, *Re* Conley (Trading as Caplan & Conley) [Ch. D.] .. 438
Barnes (Inspector of Taxes) *v.* Hely Hutchinson [K.B.D.] .. 286
Barnes *v.* Irwell Valley Water Board [K.B.D.] .. 675
Barnstaple Justices, R. *v.*, *Ex p.* Carder [K.B.D. Divl. Ct.] .. 263
Beauchamp *v.* Frome Rural District Council [Ch. D.] .. 348
Benney, Dunstan *v.* [C.A.] .. 510
Benson, Owen *v.*, *Re* Turkington [Ch. D.] .. 501
Bessler, Waechter, Glover & Co. *v.* South Derwent Coal Co., Ltd. [K.B.D.] .. 552
Birkenhead Corporation, Smith *v.* [K.B.D. Divl. Ct.] .. 75
Blee *v.* London & North Eastern Railway Co. [H.L.] .. 270
Board of Control, East Ham Corporation and Mordey, R. *v.*, *Ex parte* Winterflood [K.B.D. Divl. Ct.] .. 163
Boots Pure Drug Co., Ltd., *Re* Trade Mark, "Livron," of, *Re* Application of Societe des Usines Chimiques Rhone-Poulenc [C.A.] .. 23
Bosley, R. *v.* [C.C.A.] .. 100
Bowden (Lady), *Re*, Trustee in Bankruptcy *v.* Bankrupt [C.A.] .. 635
Bridgen, *Re*, Chaytor *v.* Edwin [Ch. D.] .. 342
British & French Trust Corpn. *v.* New Brunswick Ry. Co. [C.A.] .. 516
British Briquettes, Ltd., Conybear *v.* [Ch. D.] 191
British Insulated Cables, Ltd., Dransfield *v.* [K.B.D.] .. 382
British Metal Corporation, Ltd., and Ludlow Bros. (1913), Ltd., *Re* An Arbitration Between [Ch. D.] .. 154
British Union for the Abolition of Vivisection, Tudor-Hart *v.* [C.A.] .. 475
Burden *v.* Harris [K.B.D.] .. 559
Burney, Kevorkian *v.* [C.A.] .. 97
Burney, Kevorkian *v.*, (No. 2) [C.A.] .. 468
Bynoe *v.* General Federation of Trade Unions Approved Society (110) [C.A.] .. 184
Carder, *Ex p.*, R. *v.* Barnstaple Justices [K.B.D. Divl. Ct.] .. 263
Carey *v.* Ocean Coal Co., Ltd., Same *v.* Richards, Same *v.* Rees [K.B.D. Divl. Ct.] 219
Cartwright *v.* Lilleshall Co., Ltd. [C.A.] .. 242

PAGE

Carville, *Re*, Shone *v.* Walthamstow Borough Council [Ch. D.] .. 464
Caxton Publishing Co., Ltd., Sutherland Publishing Co., Ltd. *v.*, (No. 2) [C.A.] .. 405
Chakarian, Ottoman Bank of Nicosia *v.* [P.C.] 570
Charlton Steam Shipping Co., Ltd., Studebaker Distributors, Ltd. *v.* [K.B.D.] .. 304
Chartered Bank of India, Australia & China *v.* Mercantile Bank of India, Ltd., and Strauss & Co., Ltd. (in Liquidation) (No. 2) [K.B.D.] .. 651
Chaytor *v.* Edwin, *Re* Bridgen [Ch. D.] .. 342
Coad, Andrew *v.*, *Re* Lawry's Estate [Ch. D.] 1
Collins *v.* Feltham Urban District Council [K.B.D. Divl. Ct.] .. 189
Collins (Inspector of Taxes) *v.* Adamson (Joseph) & Co. [K.B.D.] .. 236
Commercial Union Assurance Co., Ltd. *v.* Inland Revenue Commissioners [K.B.D.] .. 159
Conley (Trading as Caplan & Conley), *Re*, *Ex p.* The Trustee *v.* Barclays Bank, Ltd. [Ch. D.] .. 438
Conley (Trading as Caplan & Conley), *Re*, *Ex p.* The Trustee *v.* Lloyds Bank, Ltd. [Ch. D.] .. 438
Consolidated Entertainments, Ltd. *v.* Taylor [K.B.D.] .. 432
Constable & Co., Goldschmidt *v.* [C.A.] .. 293
Conybear *v.* British Briquettes, Ltd. [Ch. D.] 191
Copelin's Contract, *Re* [Ch. D.] .. 447
Corbett *v.* Inland Revenue Commissioners [C.A.] .. 700
County of London (Stoke Newington) Housing Order, 1936, *Re*, Application of Stocker [K.B.D.] .. 678
Cristina, The [C.A.] .. 313
Croston *v.* Vaughan [C.A.] .. 249
Davies *v.* Elmslie [K.B.D.] .. 68
Davies *v.* Elmslie [C.A.] .. 471
Davis (B.), Ltd. *v.* Tooth & Co., Ltd. [P.C.] .. 118
Dawes *v.* Druitt, Phœnix Assurance Co., Ltd. *v.* Fox, *Re* Fox's Estate [C.A.] .. 664
De Choisy *v.* Hynes [Ch. D.] .. 54
Dermody *v.* Higgs & Hill, Ltd. [C.A.] .. 379
Downes & Lobbs' Contract, *Re*, Downes *v.* Lobbs [Ch. D.] .. 324
Doxford & Sons, Ltd. *v.* Furness Shipbuilding Co., Ltd. [C.A.] .. 334
Drake's Settlement Trusts, *Re*, Wilson *v.* Drake [C.A.] .. 171
Dransfield *v.* British Insulated Cables, Ltd. [K.B.D.] .. 382
Dried Milk Products, Ltd. *v.* Milk Marketing Board [K.B.D.] .. 669
Druitt, Dawes *v.*, Phœnix Assurance Co., Ltd. *v.* Fox, *Re* Fox's Estate [C.A.] .. 664
Dunstan *v.* Benney [C.A.] .. 510
East Ham Corporation, Mordey and Board of Control, R. *v.*, *Ex parte* Winterflood [K.B.D. Divl. Ct.] .. 163
Eaton *v.* Wimpey (George) & Co., Ltd. [C.A.] .. 583
Edwin, Chaytor *v.*, *Re*, Bridgen [Ch. D.] .. 342
Elmslie, Davies *v.* [K.B.D.] .. 68
Elmslie, Davies *v.* [C.A.] .. 471
Ethorpe, Ltd., Shacklock *v.* [K.B.D.] .. 672
Feltham Urban District Council, Collins *v.* [K.B.D. Divl. Ct.] .. 189
Findlay *v.* Newman, Hender & Co., Ltd. [K.B.D. Divl. Ct.] .. 58
Fox, Phœnix Assurance Co., Ltd. *v.*, Dawes *v.* Druitt, *Re* Fox's Estate [C.A.] .. 664

PAGE

Fox's Estate, *Re*, Dawes *v.* Druitt, Phœnix Assurance Co., Ltd. *v.* Fox [C.A.] 664
Francis, Lloyd *v.* [C.A.] 489
Franklin (J.) & Son, Ltd., *Re* [Ch. D.] 43
Frome Rural District Council, Beauchamp *v.* [Ch. D.] 348
Furness Shipbuilding Co., Ltd., Doxford & Sons, Ltd. *v.* [C.A.] 334
Gale *v.* New [C.A.] 645
General Accident & Life Assurance Corpn., Ltd., Peters *v.* [K.B.D.] 628
General Federation of Trade Unions Approved Society (110), Bynoe *v.* [C.A.] 184
Goadby *v.* Orridge [C.A.] 610
Goldschmidt *v.* Constable & Co. [C.A.] 293
Goole Steam Shipping (London, Midland & Scottish Railway), Purvis *v.* [C.A.] 345
Great Western Ry. Co., Trubyfield *v.* [K.B.D.] 614
Greer *v.* Kettle, *Re* Parent Trust & Finance Co., Ltd. [H.L.] 396
Gulbenkian *v.* Gulbenkian [Div.] 618
Gull, Inland Revenue Commissioners *v.* [K.B.D.] 290
Gunn *v.* Richardson, *Re* Winterstoke's Will Trusts [Ch. D.] 63
Hanlon *v.* Port of Liverpool Stevedoring Co., Ltd. [K.B.D. Liverpool Summer Assizes] 39
Harris, Burden *v.* [K.B.D.] 559
Hely Hutchinson, Barnes (Inspector of Taxes) *v.* [K.B.D.] 286
Higgs & Hill, Ltd., Dermody *v.* [C.A.] 379
Hills *v.* London Passenger Transport Board [C.A.] 230
Hindsley (Inspector of Taxes), Allied Newspapers, Ltd. *v.* [C.A.] 677
Holden *v.* Howard [C.A.] 483
Holgate *v.* Lancashire Mental Hospitals Board, Gill and Robertson [K.B.D. Liverpool Summer Assizes] 19
Howard, Holden *v.* [C.A.] 483
Hubbard *v.* Messenger [K.B.D. Divl. Ct.] 48
Hynes, De Choisy *v.* [Ch. D.] 54
Industrial Machinery Co., Ltd., Molins *v.* [C.A.] 295
Inland Revenue Commissioners, Austins of East Ham, Ltd. *v.* [K.B.D.] 275
Inland Revenue Commissioners, Commercial Union Assurance Co., Ltd. *v.* [K.B.D.] 159
Inland Revenue Commissioners, Corbett *v.* [C.A.] 700
Inland Revenue Commissioners *v.* Gull [K.B.D.] 290
Inland Revenue Commissioners, Lever Brothers, Ltd. *v.* [K.B.D.] 227
Irwell Valley Water Board, Barnes *v.* [K.B.D.] 675
Johnson, Lind *v.* [K.B.D.] 201
Johnson & Johnson (Great Britain), Ltd.'s, Patent, *Re* [C.A.] 561
Johnson (deceased), Williams *v.* [P.C.] 34
Jones *v.* Welsh Insurance Corporation, Ltd. [K.B.D.] 149
Kasofsky *v.* Kreegers (Phillips, Claimant) [K.B.D. Divl. Ct.] 374
Kettle, Greer *v.*, *Re* Parent Trust & Finance Co., Ltd. [H.L.] 396
Kevorkian *v.* Burney [C.A.] 97
Kevorkian *v.* Burney (No.2) [C.A.] 468
Kornatzki *v.* Oppenheimer [Ch. D.] 133
Kreegers, Kasofsky *v.*, (Phillips, Claimant) [K.B.D. Divl. Ct.] 374
Lancashire Mental Hospitals Board, Gill and Robertson, Holgate *v.* [K.B.D. Liverpool Summer Assizes] 19
Lawry's Estate, *Re*, Andrew *v.* Coad [Ch. D.] 1
Lever Brothers, Ltd. *v.* Inland Revenue Commissioners [K.B.D.] 227
Lewis, R. *v.* [C.C.A.] 360
Lilleshall Co., Ltd., Cartwright *v.* [C.A.] 242
Lind *v.* Johnson [K.B.D.] 201
Liverpool Corporation, *Ex parte*, *Re* Mill Lane Land, Everton, *Re* Liverpool Education (Emmanuel School Purchase) Order, 1929 [Ch. D.] 197
Liverpool Education (Emmanuel School Purchase) Order, 1929, *Re*, *Re* Mill Lane Land, Everton, *Ex parte* Liverpool Corporation [Ch. D.] 197
Liverpool (Port of) Stevedoring Co., Ltd., Hanlon *v.* [K.B.D. Liverpool Summer Assizes] 39
"Livron," Trade Mark, of Boots Pure Drug Co., Ltd., *Re*, *Re* Application of Societe des Usines Chimiques Rhone-Poulenc [C.A.] 23
Lloyd *v.* Francis [C.A.] 489
Lloyds Bank, Ltd., *Ex p.* The Trustee *v.*, *Re* Conley (trading as Caplan & Conley) [Ch. D.] 438
Lobbs, Downes *v.*, *Re* Downes & Lobbs' Contract [Ch. D.] 324
London & North Eastern Railway Co., Blee *v.* [H.L.] 270
London Passenger Transport Board, Hills *v.* [C.A.] 230
Ludlow Bros. (1913), Ltd., and British Metal Corporation, Ltd., *Re* An Arbitration Between [Ch. D.] 154
McCarthy *v.* Penrikyber Navigation Colliery Co., Ltd. [C.A.] 597
McLaughlin, Solloway *v.* [P.C.] 328
Melksham Urban District Council *v.* Wiltshire County Council [K.B.D. Divl. Ct.] 142
Mercantile Bank of India, Ltd. *v.* Chartered Bank of India, Australia & China, and Strauss & Co., Ltd. (in Liquidation) (No. 2) [K.B.D.] 651
Mercantile Union Guarantee Corporation, Ltd. *v.* Wheatley [K.B.D.] 713
Messenger, Hubbard *v.* [K.B.D. Divl. Ct.] 48
Metropolitan Water Board, Wells *v.* [K.B.D.] 639
Midland Bank, Ltd., Motor Traders Guarantee Corpn., Ltd. *v.* [K.B.D.] 90
Milk Marketing Board, Dried Milk Products, Ltd. *v.* [K.B.D.] 669
Mill Lane Land, Everton, *Re*, *Re* Liverpool Education (Emmanuel School Purchase) Order, 1929, *Ex parte* Liverpool Corporation [Ch. D.] 197
Molins *v.* Industrial Machinery Co., Ltd. [C.A.] 295
Mordey, Board of Control and East Ham Corporation, R. *v.*, *Ex parte* Winterflood [K.B.D. Divl. Ct.] 163
Morgan *v.* Tareni Colliery Co., Ltd. [C.A.] 505
Morley (Inspector of Taxes) *v.* Tattersall [K.B.D.] 339
Morris *v.* Winsbury-White [K.B.D.] 494
Motor Traders Guarantee Corpn., Ltd. *v.* Midland Bank, Ltd. [K.B.D.] 90
Mount Albert Borough Council *v.* Australasian Temperance and General Mutual Life Assurance Society, Ltd. [P.C.] 206
Murray *v.* Redpath, Brown & Co., Ltd. [C.A.] 478
Murray *v.* Thomas [Ch. D.] 545
New Brunswick Ry. Co., British & French Trust Corpn. *v.* [C.A.] 516
New, Gale *v.* [C.A.] 645
Newman, Hender & Co., Ltd., Findlay *v.* [K.B.D. Divl. Ct.] 58
North Level Commissioners *v.* River Welland Catchment Board [Ch. D.] 684
North Western Traffic Area Licensing Authority, Woodward *v.* *Re* An Application by Woodward [Ch. D.] 656
Ocean Coal Co., Ltd., Carey *v.* [K.B.D. Divl. Ct.] 219
Oppenheimer, Kornatzki *v.* [Ch. D.] 133
Ormerod Taylor & Son, Ltd., A.-G. (at the relation of Ormerod Taylor & Son, Ltd.) and, *v.* Todmorden Borough Council [K.B.D.] 588
Orridge, Goadby *v.* [C.A.] 610
Ottoman Bank of Nicosia *v.* Chakarian [P.C.] 570
Owen *v.* Benson, *Re* Turkington [Ch. D.] 501
Parent Trust & Finance Co., Ltd., *Re*, Greer *v.* Kettle [H.L.] 396
Penrikyber Navigation Colliery Co., Ltd., McCarthy *v.* [C.A.] 597
Perry *v.* Sharon Development Co., Ltd. [C.A.] 390
Peters *v.* General Accident & Life Assurance Corpn., Ltd. [K.B.D.] 628

PAGE

Phillips (Claimant), Kasofsky *v.* Kreegers [K.B.D. Divl. Ct.] .. 374
Phœnix Assurance Co., Ltd. *v.* Fox, Dawes *v.* Druitt, *Re* Fox's Estate [C.A.] .. 664
Purvis *v.* Goole Steam Shipping (London, Midland & Scottish Railway) [C.A.] .. 345
R. *v.* Barnstaple Justices, *Ex p.* Carder [K.B.D. Divl. Ct.] .. 263
R. *v.* Boseley [C.C.A.] .. 100
R. *v.* Lewis [C.C.A.] .. 360
R. *v.* Mordey, Board of Control and East Ham Corporation, *Ex parte* Winterflood [K.B.D. Divl. Ct.] .. 163
R. *v.* Rothfield [C.C.A.] .. 320
R. *v.* Sheffield Confirming Authority, *Ex parte* Truswell's Brewery Co., Ltd. [K.B.D. Divl. Ct.] .. 114
R. *v.* Shoreditch County Court Registrar, *Ex parte* Saxon Finance Corporation, Ltd. [K.B.D. Divl. Ct.] .. 231
R. *v.* Sussex Confirming Authority, *Ex parte* Tamplin & Sons' Brewery (Brighton), Ltd. [K.B.D. Divl. Ct.] .. 106
R. *v.* Warn [C.C.A.] .. 327
Redpath, Brown & Co., Ltd., Murray *v.* [C.A.] 478
Rees, Carey *v.* [K.B.D. Divl. Ct.] .. 219
Richards, Carey *v.* [K.B.D. Divl. Ct.] .. 219
Richardson, Gunn *v.*, *Re* Winterstoke's Will Trusts [Ch. D.] .. 63
Roast *v.* Roast [Div.] .. 423
Rothfield, R. *v.* [C.C.A.] .. 320
Saxon Finance Corporation, Ltd., *Ex parte*, R. *v.* Shoreditch County Court Registrar [K.B.D. Divl. Ct.] .. 231
Scophony, Ltd. *v.* Traub [C.A.] .. 279
Scorah, Triplex Safety Glass Co., Ltd. *v.* [Ch. D.] .. 693
Shacklock *v.* Ethorpe, Ltd. [K.B.D.] .. 672
Sharon Development Co., Ltd., Perry *v.* [C.A.] 390
Sheffield Confirming Authority, R. *v.*, *Ex parte* Truswell's Brewery Co., Ltd. [K.B.D. Divl. Ct.] .. 114
Shone *v.* Walthamstow Borough Council, *Re* Carville [Ch. D.] .. 464
Shoreditch County Court Registrar, *R. v.*, *Ex parte* Saxon Finance Corporation, Ltd. [K.B.D. Divl. Ct.] .. 231
Singh (Man) of Sewai Jaipur (Maharaja) *v.* Arjun Lal [P.C.] .. 5
Sitwell *v.* Sun Engraving Co., Ltd. [C.A.] .. 366
Smith *v.* Birkenhead Corporation [K.B.D. Divl. Ct.] .. 75
Societe des Usines Chimiques Rhone-Poulenc, Application of, *Re*, *Re* Trade Mark, "Livron," of Boots Pure Drug Co., Ltd. [C.A.] .. 23
Solloway *v.* McLaughlin [P.C.] .. 328
South Derwent Coal Co., Ltd., Bessler, Waechter, Glover & Co. *v.* [K.B.D.] .. 552
Spilsbury (Inspector of Taxes) *v.* Spofforth [K.B.D.] .. 487
Spittle *v.* Thames Grit & Aggregates, Ltd. [K.B.D. Divl. Ct.] .. 101
Spofforth, Spilsbury (Inspector of Taxes) *v.* [K.B.D.] .. 487
Stocker, Application of, *Re* County of London (Stoke Newington) Housing Order, 1936, [K.B.D.] .. 678
Strauss & Co., Ltd. (in Liquidation), Mercantile Bank of India, Ltd. *v.* Chartered Bank of India, Australia & China and, (No. 2) [K.B.D.] .. 651
Studebaker Distributors, Ltd. *v.* Charlton Steam Shipping Co., Ltd. [K.B.D.] .. 304

PAGE

Sun Engraving Co., Ltd., Sitwell *v.* [C.A.] .. 366
Sussex Confirming Authority, R. *v.*, *Ex parte* Tamplin & Sons' Brewery (Brighton), Ltd. [K.B.D. Divl. Ct.] .. 106
Sutherland Publishing Co., Ltd. *v.* Caxton Publishing Co., Ltd. (No. 2) [C.A.] .. 405
Talbot-Ponsonby's Estate, *Re*, Talbot-Ponsonby *v.* Talbot-Ponsonby [Ch. D.] .. 309
Tamplin & Sons' Brewery (Brighton), Ltd., *Ex parte*, R. *v.* Sussex Confirming Authority [K.B.D. Divl. Ct.] .. 106
Tareni Colliery Co., Ltd., Morgan *v.* [C.A.] .. 505
Tattersall, Morley (Inspector of Taxes) *v.* [K.B.D.] .. 339
Taylor, Consolidated Entertainments, Ltd. *v.* [K.B.D.] .. 432
Thames Grit & Aggregates, Ltd., Spittle *v.* [K.B.D. Divl. Ct.] .. 101
Thomas, Murray *v.* [Ch. D] .. 545
Todmorden Borough Council, A.-G. (at the relation of Ormerod Taylor & Son., Ltd.) and Ormerod Taylor & Son, Ltd. *v.* [K.B.D.] 588
Tooth & Co., Ltd., Davis (B.), Ltd. *v.* [P.C.] .. 118
Traub, Scophony, Ltd. *v.* [C.A.] .. 279
Triplex Safety Glass Co., Ltd. *v.* Scorah [Ch. D.] .. 693
Trubyfield *v.* Great Western Ry. Co. [K.B.D.] .. 614
Trustee, *Ex p.* The, *v.* Barclays Bank, Ltd., *Ex p.* The Trustee *v.* Lloyds Bank, Ltd., *Re* Conley (trading as Caplan & Conley) [Ch. D.] .. 438
Trustee in Bankruptcy *v.* Bankrupt, *Re* Bowden (Lady) [C.A.] .. 635
Truswell's Brewery Co., Ltd., *Ex parte*, R. *v.* Sheffield Confirming Authority [K.B.D. Divl. Ct.] .. 114
Tudor-Hart *v.* British Union for the Abolition of Vivisection [C.A.] .. 475
Turkington, *Re*, Owen *v.* Benson [Ch. D.] .. 501
Two Solicitors, *Re* [C.A.] .. 451
Vaughan, Croston *v.* [C.A.] .. 249
Vernazza *v.* Barburriza & Co., Ltd. [C.A.] .. 364
Walthamstow Borough Council, Shone *v.*, *Re* Carville [Ch. D.] .. 464
Warn, R. *v.* [C.C.A.] .. 327
Welland River Catchment Board, North Level Commissioners *v.* [Ch. D.] .. 684
Wells *v.* Metropolitan Water Board [K.B.D.] 639
Welsh Insurance Corporation, Ltd., Jones *v.* [K.B.D.] .. 149
Wheatley, Mercantile Union Guarantee Corporation, Ltd. *v.* [K.B.D.] .. 713
Williams *v.* Johnson (deceased) [P.C.] .. 34
Wilson *v.* Drake, *Re* Drake's Settlement Trusts [C.A.] .. 171
Wilson *v.* Wright [C.A.] .. 371
Wiltshire Bacon Co., Ltd. *v.* Associated Cinema Properties, Ltd. [C.A.] .. 80
Wiltshire County Council, Melksham Urban District Council *v.* [K.B.D. Divl. Ct.] .. 142
Wimpey (George) & Co., Ltd., Eaton *v.* [C.A.] 583
Winsbury-White, Morris *v.* [K.B.D.] .. 494
Winterflood, *Ex parte*, R. *v.* Mordey, Board of Control and East Ham Corporation [K.B.D. Divl. Ct.] .. 163
Winterstoke's Will Trusts, *Re*, Gunn *v.* Richardson [Ch. D.] .. 63
Woods *v.* Woods [Div.] .. 9
Woodward, *Re* An Application by, Woodward *v.* North Western Traffic Area Licensing Authority [Ch. D.] .. 656
Wright, Wilson *v.* [C.A.] .. 371

CASES REFERRED TO

PAGES

Adelaide Electric Supply Co., Ltd. *v.* Prudential Assurance Co., Ltd., [1934] A.C. 122; Digest Supp.; 103 L.J. Ch. 85; 150 L.T. 281 .. 207 208, 215, 518, 521, 525, 526, 527, 543, 570, 571, 575

Aga Khan *v.* Times Publishing Co., Dawson *v.* Same, [1924] 1 K.B. 675; 32 Digest 153, *1847*; 93 L.J.K.B. 361; 130 L.T. 746 .. 475, 476, 477

Agriculture & Fisheries Minister *v.* Dean, [1924] 1 K.B. 851; Digest Supp.; 93 L.J.K.B. 374; 130 L.T. 709 .. 510, 511, 515

Airey, *Re*, Airey *v.* Stapleton, [1897] 1 Ch. 164; 1 Digest 386, *900*; 66 L.J. Ch. 152; 76 L.T. 151 .. 447, 448

Aksionairnoye Obschestvo A. M. Luther *v.* Sagor (James) & Co., [1921] 3 K.B. 532; 38 Digest 7, *13*; 90 L.J.K.B. 1202; 125 L.T. 705 .. 314, 317

Alderman *v.* Great Western Ry. Co., [1937] A.C. 454; [1937] 2 All E.R. 408; Digest Supp.; 106 L.J.K.B. 335; 156 L.T. 441 .. 271, 272

Aldin *v.* Stewart, [1916] S.C. 13; 34 Digest 495, case *l* .. 201, 205

Alexander *v.* Vanderzee (1872), L.R. 7 C.P. 530; 39 Digest 425, *563* .. 371, 374

Allester (D.), Ltd., *Re*, [1922] 2 Ch. 211 Digest Supp.; 91 L.J. Ch. 797; 127 L.T. 434 652

Allhusen *v.* Whittell (1867), L.R. 4 Eq. 295; 23 Digest 464, *5358*; 36 L.J. Ch. 929; 16 L.T. 695 .. 700, 701, 702, 705, 706, 707, 709, 710, 711, 712

Amos, *Re*, Carrier *v.* Price, [1891] 3 Ch. 159; 8 Digest 270, *355*; 60 L.J. Ch. 570; 65 L.T. 69 .. 501, 502

Anderson *v.* Equitable Assurance Society of United States (1926), 134 L.T. 557; 35 Digest 176, *62* .. 571, 572

Anglo-Persian Oil Co., Ltd. *v.* Dale, [1932] 1 K.B. 124; Digest Supp.; 100 L.J.K.B. 504; 145 L.T. 529; 16 Tax Cas. 253 .. 236, 240

Annette, The, The Dora, [1919] P. 105; 38 Digest 7, *12*; 88 L.J.P. 107 .. 314, 315

Anslow *v.* Cannock Chase Colliery Co., Ltd., [1909] A.C. 435; 34 Digest 422, *3431*; 78 L.J.K.B. 679; 100 L.T. 786; 2 B.W.C.C. 361, 365 .. 506, 508, 509

Apollinaris Co.'s Trade Marks, *Re*, [1891] 1 Ch. 1; Digest, Practice, 910, *4516*; 63 L.T. 502 .. 468, 469

Arnold & Butler *v.* Bottomley, [1908] 2 K.B. 151; Digest, Practice, 190, *1615*; 77 L.J.K.B. 584; 98 L.T. 777 .. 294

Ash *v.* Hutchinson & Co. (Publishers), Ltd., [1936] Ch. 489; [1936] 2 All E.R. 1496; Digest Supp.; 155 L.T. 46 .. 406, 409

Atkinson *v.* London & North Eastern Ry. Co., [1926] 1 K.B. 313; Digest Supp.; 95 L.J.K.B. 266; 134 L.T. 217 .. 59, 60

A.-G. *v.* Belilios, [1928] 1 K.B. 798; Digest Supp.; 97 L.J.K.B. 139; 138 L.T. 294 171, 176, 182

A.-G. *v.* Floyer (1862), 9 H.L. Cas. 477; 21 Digest 86, *622*; 31 L.J. Ex. 404; 7 L.T. 47 171, 180

A.-G. *v.* Shrewsbury (Kingsland) Bridge Co. (1882), 21 Ch. D. 752; 26 Digest 451, *1668*; 51 L.J. Ch. 746; 46 L.T. 687 .. 589, 590

A.-G. *v.* Staffordshire County Council, [1905] 1 Ch. 336; 26 Digest 353, *797*; 74 L.J. Ch. 153; 92 L.T. 288 .. 589, 590, 595

A.-G. *v.* Terry (1874), 9 Ch. App. 423; 44 Digest 121, *971*; 30 L.T. 215 .. 106, 109

Auckland City Council *v.* Alliance Assurance Co., Ltd., [1937] A.C. 587; [1937] 1 All E.R. 645; Digest Supp.; 106 L.J.P.C. 40; 156 L.T. 367 .. 207, 208, 215, 570, 571, 575

Baker *v.* Faber, [1908] W.N. 9; Digest, Practice, 806, *3690* .. 97, 98

Barcelo *v.* Electrolytic Zinc Co. of Australasia, Ltd. (1932), 48 C.L.R. 391 .. 207, 208, 217

Barnardo's Homes *v.* Income Tax Special Comrs., [1921] 2 A.C. 1; 23 Digest 394, *4653*; 90 L.J.K.B. 545; 125 L.T. 250; 7 Tax Cas. 646 .. 701, 702, 703, 704, 707, 708, 710, 713

Barnett, *Re*, Waring *v.* Painter Stainers' Co. (1908), 24 T.L.R. 788; 8 Digest 263, *256* 501, 502

Baron *v.* Portslade Urban Council, [1900] 2 Q.B. 588; 41 Digest 25, *192*; 69 L.J.Q.B. 899; 83 L.T. 363 .. 589, 590

Barwell *v.* Abercarn Black Vein Steam Coal Co., Ltd., [1915] 2 K.B. 256; 34 Digest 736, *1137*; 84 L.J.K.B. 1105; 112 L.T. 806 .. 598, 599, 605, 607, 609

Benaim & Co. *v.* Debono, [1924] A.C. 514; Digest Supp.; 93 L.J.P.C. 133; 131 L.T. 1 207, 208, 209, 518, 521, 540

Blackpool Corpn. *v.* Starr Estate Co., [1922] 1 A.C. 27; 42 Digest 770, *1974*; 91 L.J.K.B. 202; 126 L.T. 258 .. 684, 692

Blatchford *v.* Staddon & Founds (1927), 43 T.L.R. 424; 34 Digest 465, *3810*; 20 B.W.C.C. 391 .. 583, 586, 587

Borwick, *Re*, Borwick *v.* Borwick, [1933] Ch. 657; Digest Supp.; 102 L.J. Ch. 199; 149 L.T. 116 .. 310, 311

Boston *v.* Boston (1928), 138 L.T. 647; Digest Supp. .. 424

Bottomley *v.* Bannister, [1932] 1 K.B. 458; Digest Supp.; 101 L.J.K.B. 46; 146 L.T. 68 .. 390, 393

Bourgeois *v.* Weddell & Co., [1924] 1 K.B. 539; Digest Supp.; 93 L.J.K.B. 232; 130 L.T. 635 .. 154, 155

Bowes *v.* Shand (1877), 2 App. Cas. 455; 39 Digest 425, *564*; 46 L.J.Q.B. 561; 36 L.T. 857 .. 371, 374

Bowman, *Re*, South Shields (Thames Street) Clearance Order, 1931, [1932] 2 K.B. 621; Digest Supp.; 101 L.J.K.B. 798; 147 L.T. 150 .. 678, 683

Bowman *v.* Taylor (1834), 2 Ad. & El. 278; 21 Digest 257, *810*; 4 L.J.K.B. 58 .. 397, 402, 403

Braybrooke (Lord) *v.* A.-G. (1861), 9 H.L. Cas. 150; 21 Digest 94, *694*; 31 L.J. Ex. 177; 4 L.T. 218 .. 171, 179, 180

Brinsmead (John) & Sons, Ltd., *Re*, (1912) ,56 Sol. Jo. 253; 31 Digest 439, *5852* .. 325

British Insulated & Helsby Cables *v.* Atherton, [1926] A.C. 205; 28 Digest 52, *264*; 95 L.J.K.B. 336; 134 L.T. 289; 10 Tax Cas. 155 .. 236, 238, 241

British South Africa Co. *v.* De Beers Consolidated Mines, Ltd., [1910] 2 Ch. 502; 11 Digest 351, *361*; 80 L.J. Ch. 65; 103 L.T. 4; *revsd.* on other grounds, [1912] A.C. 52 207, 208, 519, 521

PAGES

British Thomson-Houston Co., Ltd. *v.* Metropolitan-Vickers Electrical Co., Ltd. (1928), 45 R.P.C. 1; Digest Supp.; *on appeal from* 42 R.P.C. 143 .. 295, 297, 298
Brodie *v.* Brodie, [1917] P. 271; 27 Digest 223, *1937*; 86 L.J.P. 140; 117 L.T. 542 .. 69, 71
Broken Hill Proprietary Co., Ltd. *v.* Latham, [1933] Ch. 373; Digest Supp.; 102 L.J. Ch. 163; 148 L.T. 412 .. 207, 208, 570, 571, 575
Brook, Delcomyn & Badart, *Re*, (1864), 16 C.B.N.S. 403; 2 Digest 446, *949*; 33 L.J.C.P. 246 .. 154, 155
Brooke *v.* Haymes (1868), L.R. 6 Eq. 25; 21 Digest 73, *487* .. 397, 404
Brown *v.* Cotterill (1934), 51 T.L.R. 21; Digest Supp. .. 383, 387
Brown *v.* Symons (1860), 8 C.B.N.S. 208; 34 Digest 55, *296*; 29 L.J.C.P. 251; 2 L.T. 323 324, 325
Brunsden *v.* Humphrey (1884), 14 Q.B.D. 141; 21 Digest 207, *480*; 53 L.J.Q.B. 476; 51 L.T. 529 .. 517, 519, 522
Buckland *v.* Johnson (1854), 15 C.B. 145; 43 Digest 531, *667*; 23 L.J.C.P. 204; 23 L.T.O.S. 190 .. 329, 330
Buerger *v.* New York Life Assurance Co. (1927), 96 L.J.K.B. 930; Digest Supp.; 137 L.T. 431 .. 571, 572
Bulkeley *v.* Stephens, [1896] 2 Ch. 241; 40 Digest 678, *2145*; 65 L.J. Ch. 597; 74 L.T. 409 64, 65, 67
Burgess *v.* Northwich Local Board (1880), 6 Q.B.D. 264; 26 Digest 335, *661*; 50 L.J.Q.B. 219; 44 L.T. 154 .. 589, 590
Burn *v.* Morris (1834), 2 Cr. & M. 579; 42 Digest 996, *236*; 3 L.J. Ex. 193 .. 329, 330
Burrows *v.* Lang, [1901] 2 Ch. 502; 19 Digest 36, *189*; 70 L.J. Ch. 607; 84 L.T. 623 349, 357
Burt, Boulton & Hayward *v.* Bull, [1895] 1 Q.B. 276; 10 Digest 803, *5091*; 64 L.J.Q.B. 232; 71 L.T. 810 .. 432, 436
Butt (Henry) & Co. *v.* Weston-super-Mare Urban District Council, [1922] 1 A.C. 340; 26 Digest 462, *1772*; 91 L.J. Ch. 305; 127 L.T. 34 .. 589, 590

Calderon *v.* Atlas Steamship Co., 170 U.S.R. 272 .. 305, 309
Carter *v.* Lang & Sons, [1908] S.C. 1198; 34 Digest 428, case *3483 ii*; 1 B.W.C.C. 379 506, 508
Celia, S.S. *v.* Volturno, S.S., [1921] 2 A.C. 544; 35 Digest 174, *39*; 90 L.J.P. 385; 126 L.T. 1 .. 571, 572
Chapman, *Re*, Hales *v.* A.-G., [1922] 2 Ch. 479; 23 Digest 471, *5405*; 91 L.J.Ch. 527; 127 L.T. 616 .. 465, 466
Chatenay *v.* Brazilian Submarine Telegraph Co., [1891] 1 Q.B. 79; 17 Digest 331, *1424*; 60 L.J.Q.B. 295; 63 L.T. 739 .. 207, 208, 518, 521, 540
Chesterman's Trusts, *Re*, Mott *v.* Browning, [1923] 2 Ch. 466; 35 Digest 169, *12*; 93 L.J.Ch. 263; 130 L.T. 109 .. 570, 571, 575
Clark *v.* Adie (No. 2) (1877), 2 App. Cas. 423; 36 Digest 638, *1081*; 46 L.J.Ch. 598; 37 L.T. 1; *affg.* (1876), 3 Ch. D. 134 .. 397, 403
Clarke, *Re*, Clarke *v.* Clarke, [1901] 2 Ch. 110; 8 Digest 263, *250*; 70 L.J.Ch. 631; 84 L.T. 811 .. 501, 503, 504
Clarke *v.* Barber (1890), 6 T.L.R. 256; Digest, Practice, 910, *4514* .. 468, 469
Clavering *v.* Ellison (1859), 7 H.L. Cas. 707; 44 Digest 440, *2667*; 29 L.J.Ch. 761 309, 310, 311
Codling *v.* Mowlem (John) & Co., Ltd., [1914] 3 K.B. 1055; 36 Digest 137, *906*; 83 L.J.K.B. 1727; 111 L.T. 1086 .. 329, 330
Coles & Ravenshear, *Re*, [1907] 1 K.B. 1; Digest, Practice, 806, *3688*; 76 L.J.K.B. 27; 95 L.T. 750 .. 97, 98, 99
Colonial Securities Trust, Ltd. *v.* Massey, [1896] 1 Q.B. 38; Digest, Practice, 770, *3350*; 65 L.J.Q.B. 100; 73 L.T. 497 .. 35, 36
Colquhoun *v.* Heddon (1890), 25 Q.B.D. 129; 28 Digest 92, *546*; 59 L.J.Q.B. 465; 62 L.T. 853; 2 Tax Cas. 621 .. 291, 292
Compagnies Réunies des Glaces et Verres Spéciaux du Nord de la France, *Re*, (1930), 48 R.P.C. 185 .. 562, 567
Cooke *v.* Rickman, [1911] 2 K.B. 1125; 21 Digest 178, *295*; 81 L.J.K.B. 38; 105 L.T. 896 .. 518, 523
Costigan *v.* Gray Bovier Engines, Ltd. (1925), 41 T.L.R. 372; 34 Digest 63, *388* .. 324, 325
Cowen (B.D.) (Trading as Ideal Trading Stamp Co.) & Cowen's Ideal Trading Stamp Co. (Glasgow), Ltd. *v.* Inland Revenue Commissioners (1934), 19 Tax Cas. 155; Digest Supp. .. 339, 341
Cowley *v.* Newmarket Local Board, [1892] A.C. 345; 26 Digest 400, *1251*; 62 L.J.Q.B. 65; 67 L.T. 486 .. 589, 590
Crewe *v.* Crewe (1800), 3 Hag. Ecc. 123; 27 Digest 333, *3133* .. 9, 15
Cronk (John) & Sons, Ltd. *v.* Harrison (1935), 153 L.T. 366; Digest Supp.; *affd.*, [1936] 3 All E.R. 747; 20 Tax Cas. 612; [1937] A.C. 185; 106 L.J.K.B. 70; 156 L.T. 20 339, 341
Crozat *v.* Brogden, [1894] 2 Q.B. 30; Digest, Practice, 909, *4500*; 63 L.J.Q.B. 325; 70 L.T. 522 .. 468, 469
Cuckson *v.* Stones (1858), 1 E. & E. 248; 34 Digest 71, *483*; 28 L.J.Q.B. 25; 32 L.T.O.S. 242 .. 201, 205
Cuff *v.* Penn (1813), 1 M. & S. 21; 39 Digest 653, *2466* .. 553, 555
Culpeck *v.* Orient Steam Navigation Co., Ltd. (1922), 15 B.W.C.C. 187; 34 Digest 293, *2445* .. 379, 380, 382

Davidson (Charles R.) & Co. *v.* M'Robb or Officer, [1918] A.C. 304; 34 Digest 276, *2339*; 87 L.J.P.C. 58; 118 L.T. 451; 10 B.W.C.C. 673 .. 271, 272
Dayrell-Steyning *v.* Dayrell-Steyning, [1922] P. 280; 28 Digest 68, *354*; 91 L.J.P. 210; 127 L.T. 846 .. 487, 488
Digby *v.* Financial News, Ltd., [1907] 1 K.B. 502; 32 Digest 152, *1845*; 76 L.J.K.B. 321; 96 L.T. 172 .. 475, 476
Douglas *v.* Douglas, Douglas *v.* Webster (1871), L.R. 12 Eq. 617; 11 Digest 315, *54*; 41 L.J.Ch. 74; 25 L.T. 530 .. 618, 625
Dransfield *v.* British Insulated Cables, Ltd., [1937] 4 All E.R. 382; Digest Supp. .. 615
Dublin City Distillery, Ltd. *v.* Doherty, [1914] A.C. 823; 7 Digest 20, case *88 i*; 83 L.J.P.C. 265; 111 L.T. 81 .. 652
Durrant *v.* British Fibro-Cement Works, Ltd. (1935), 104 L.J.K.B. 222; Digest Supp.; 152 L.T. 205; 27 B.W.C.C. 460 .. 583, 587

Earl *v.* Lubbock, [1905] 1 K.B. 253; 36 Digest 63, *408*; 74 L.J.K.B. 121; 91 L.T. 830 383, 386
Eastman Photographic Materials Co. *v.* Comptroller-General of Patents, Designs and Trade Marks, [1898] A.C. 571; 15 R.P.C. 476; 43 Digest 140, *32*; 67 L.J.Ch. 628; 79 L.T. 195 .. 24, 26

PAGES

Eaton *v.* Sanxter (1834), 6 Sim. 517; 40 Digest 295, *2545*; 3 L.J.Ch. 197 447
Ebrard *v.* Gassier (1884), 28 Ch.D. 232; Digest, Practice, 910, *4511*; 54 L.J.Ch. 441; 52 L.T. 63 .. .. 468, 469
Edmondson *v.* Nuttall (1864), 17 C.B.N.S. 280; 43 Digest 521, *586*; 34 L.J.C.P. 102 329, 330, 332
Elliott *v.* Liggens, [1902] 2 K.B. 84; 34 Digest 490, *4063*; 71 L.J.K.B. 483; 87 L.T. 29; 4 W.C.C. 11 .. .. 201, 205
Ellis *v.* M'Henry (1871), L.R. 6 C.P. 228; 11 Digest 407, *757*; 40 L.J.C.P. 109; 23 L.T. 861 .. .. 207, 208
Evans *v.* Bremridge (1855), 2 K. & J. 174; 26 Digest 72, *517*; 25 L.J. Ch. 102; 26 L.T.O.S. 164; *on appeal* (1856), 8 De G.M. & G. 100 .. .. 397, 400
Evans *v.* Rival Granite Quarries, Ltd., [1910] 2 K.B. 979; 10 Digest 752, *4698*; 79 L.J.K.B. 970 .. .. 374, 375
Evans & Glamorgan County Council, *Re*, (1912), 76 J.P. 468; 42 Digest 3, *7* .. 510, 511
Eveno's Patent, *Re*, [1932] 2 Ch. 167; Digest Supp.; 101 L.J. Ch. 395; 147 L.T. 478; 49 R.P.C. 385 .. .. 561, 562, 569
Ex-Army Transport, Ltd. *v.* Diamond & Co., Ltd. (1936), 24 Ry. & Can. Tr. Cas. 303; Digest Supp. 657, 663

Falmouth (Well Lane, Sedgmond's Court and Smithick Hill) Clearance Order, 1936, *Re*, Application of Halse, [1937] 3 All E.R. 308; Digest Supp.; 157 L.T. 140 .. .. 678, 683
Farr *v.* Butters Bros. & Co., [1932] 2 K.B. 606; Digest Supp.; 101 L.J.K.B. 768; 147 L.T. 427 .. .. 383, 386
Feist *v.* Société Intercommunale Belge d'Electricité, [1934] A.C. 161; Digest Supp.; 103 L.J. Ch. 41; 150 L.T. 41 517, 519, 522, 525, 526, 527, 528, 533, 534, 535, 536, 537, 541, 570, 576
Fender *v.* Mildmay, [1937] 3 All E.R. 402; Digest Supp.; 106 L.J.K.B. 641; 157 L.T. 340 .. .. 69, 73, 471, 473
Fenton *v.* Nevin (1893), 31 L.R. Ir. 478 .. .. 465, 466
Fillingham *v.* Bromley (1823), Turn. & R. 530; 44 Digest 442, *2675* 310, 312
Finchley Electric Light Company *v.* Finchley Urban Council, [1903] 1 Ch. 437; 26 Digest 329, *608*; 72 L.J. Ch. 297; 88 L.T. 215 .. .. 5, 7, 8
Fouldes *v.* Willoughby (1841), 8 M. & W. 540; 43 Digest 472, *116*; 10 L.J. Ex. 364 329, 333
Freman *v.* Whitbread (1865), L.R. 1 Eq. 266; 40 Digest 678, *2144*; 35 L.J. Ch. 137; 13 L.T. 550 .. .. 64, 65
French Government *v.* Tsurushima Maru (Owners) (1921), 37 T.L.R. 961; Digest Supp. 154, 155

Gagara, The, [1919] P. 95; Digest Supp.; 88 L.J.P. 101; 122 L.T. 498 .. .. 314, 319
Gardner *v.* Ingram (1889), 61 L.T. 729; 31 Digest 446, *5931* 325
Gibbs & Sons *v.* Société Industrielle et Commerciale des Métaux (1890), 25 Q.B.D. 399; 11 Digest 388, *642*; 59 L.J.Q.B. 510; 63 L.T. 503 .. .. 207, 208, 518, 540
Gibraltar Sanitary Comrs. *v.* Orfila (1890), 15 App. Cas. 400; 38 Digest 16, *86*; 59 L.J.P.C. 95; 63 L.T. 58 .. .. 589, 590
Gilbertson *v.* Fergusson (1881), 7 Q.B.D. 562; 28 Digest 79, *431*; 46 L.T. 10; 1 Tax Cas. 501 .. .. 287, 288, 289, 290
Glazed Kid, Ltd. *v.* Inland Revenue Commissioners (1930), 15 Tax Cas. 445; Digest Supp. 276, 277
Glenboig Union Fireclay Co., Ltd. *v.* Inland Revenue Commissioners, [1922] S.C. (H.L.) 112; 12 Tax Cas. 427 .. .. 236, 239
Glenwood Lumber Co., Ltd. *v.* Phillips, [1904] A.C. 405; 43 Digest 498, *377*; 73 L.J.P.C. 62; 90 L.T. 741 .. .. 329, 330
Goodman *v.* Saltash Corpn. (1882), 7 App. Cas. 633; 8 Digest 327, *1099*; 52 L.J.Q.B. 193; 48 L.T. 239 .. .. 545, 547
Goss *v.* Nugent (Lord) (1833), 5 B. & Ad. 58; 12 Digest 354, *2941*; 2 L.J.K.B. 127 553, 555
Goudge *v.* Broughton, Lloyd *v.* Cook, Simson *v.* Miatt, Bartram *v.* Brown, Barker *v.* Hutson, [1929] 1 K.B. 103; Digest Supp.; 97 L.J.K.B. 657; 139 L.T. 452 484, 485, 486
Grant *v.* Australian Knitting Mills, Ltd., [1936] A.C. 85; Digest Supp.; 105 L.J.P.C. 6; 154 L.T. 18 .. .. 383, 386, 387
Grant *v.* Knaresborough Urban Council, [1928] Ch. 310; Digest Supp.; 97 L.J. Ch. 106; 138 L.T. 488 .. .. 518, 520
Gray *v.* Pearson (1870), L.R. 5 C.P. 568; 8 Digest 520, *100*; 23 L.T. 416 .. .. 518, 520
Graydon, *Re*, *Ex p.* Official Receiver, [1896] 1 Q.B. 417; 42 Digest 276, *3105*; 65 L.J.Q.B. 328; 74 L.T. 175 .. .. 518, 520, 522
Green *v.* Weatherill, [1929] 2 Ch. 213; Digest Supp.; 98 L.J. Ch. 369; 142 L.T. 216 518, 520
Guaranty Trust Co. of New York *v.* Hannay & Co., [1918] 2 K.B. 623; 30 Digest 202, *718*; 87 L.J.K.B. 1223; 119 L.T. 321 .. .. 519, 520

H. *v.* W. (1857), 3 K. & J. 382; 27 Digest 222, *1935* 69, 71
Hamburger *v.* Poetting (1882), 47 L.T. 249; Digest, Practice, 910, *4510* 468, 469
Hamlyn & Co. *v.* Talisker Distillery, [1894] A.C. 202; 11 Digest 389, *643*; 71 L.T. 1 207, 208, 209
Hand *v.* Blow, [1901] 2 Ch. 721; 10 Digest 797, *5037*; 70 L.J. Ch. 687; 85 L.T. 156 432, 436
Hardwick, *Re*, (1883), 12 Q.B.D. 148; 42 Digest 408, *4661*; 53 L.J.Q.B. 64; 49 L.T. 584 452, 453
Harpur's Cycle Fittings Co., *Re*, [1900] 2 Ch. 731; 10 Digest 759, *4743*; 69 L.J. Ch. 841; 83 L.T. 407 .. .. 374, 375
Harris *v.* Amery (1865), L.R. 1 C.P. 148; 43 Digest 7, *23*; 35 L.J.C.P. 89; 13 L.T. 504 149, 150
Harvey *v.* Pocock (1843), 11 M. & W. 740; 18 Digest 368, *1090*; 12 L.J. Ex. 434; 1 L.T.O.S. 290 .. .. 329, 333
Heaven *v.* Pender (1883), 11 Q.B.D. 503; 36 Digest 8, *9*; 52 L.J.Q.B. 702; 49 L.T. 357 675, 676, 677
Helsby, *Re*, *Ex p.* Trustee, [1894] 1 Q.B. 742; 4 Digest 529, *4850*; 63 L.J.Q.B. 265; 70 L.T. 144 .. .. 97, 98
Henderson *v.* Henderson (1843), 3 Hare, 100; 21 Digest 174, *276*; 1 L.T.O.S. 410 518, 529, 538
Hennell *v.* Inland Revenue Comrs., [1933] 1 K.B. 415; Digest Supp.; 102 L.J.K.B. 69; 148 L.T. 150 .. .. 159, 161
Hickman *v.* Haynes (1875), L.R. 10 C.P. 598; 39 Digest 659, *2512*; 44 L.J.C.P. 358; 32 L.T. 873 .. .. 553, 555, 556
Hillen & Pettigrew *v.* I.C.I. (Alkali), Ltd., [1934] 1 K.B. 455; [1936] A.C. 65; Digest Supp.; 104 L.J.K.B. 473; 153 L.T. 403 .. .. 39, 40, 41, 42, 43
Hilton, *Re*, *Ex p.* March (1892), 67 L.T. 594; 21 Digest 177, *293* 518, 523

PAGES
Hindle *v.* Birtwistle, [1897] 1 Q.B. 192; 24 Digest 909, *71*; 66 L.J.Q.B. 173; 76 L.T. 159 .. 220, 226
Hobbs *v.* People Newspaper Publishing Co., Ltd. (1926), *Times* Newsp., Mar. 30 .. 475, 477
Hood Barrs *v.* Cathcart, [1894] 3 Ch. 376; 27 Digest 130, *1058*; 63 L.J. Ch. 793; 71 L.T. 11 .. 250, 254
Hordern (A.) & Sons, Ltd. *v.* Commonwealth & Dominion Line, Ltd., [1917] 2 K.B. 420; 41 Digest 434, *2726*; 86 L.J.K.B. 1048; 116 L.T. 501 .. 305, 309
Howe Machine Co., *Re*, Fontaine's Case (1889), 41 Ch. D. 118; Digest, Practice, 910, *4513*; 61 L.T. 170 .. 468, 469
Howell, *Re*, *Re* Buckingham, Liggins *v.* Buckingham, [1915] 1 Ch. 241; 23 Digest 471, *5402*; 84 L.J. Ch. 209; 112 L.T. 188 .. 465, 466
Hoystead *v.* Taxation Comr., [1926] A.C. 155; Digest Supp.; 94 L.J.P.C. 79; 134 L.T. 354 .. 518, 523, 529, 537, 538
Huckle *v.* London County Council (1910), 27 T.L.R. 112; 34 Digest 495, *4090*; 4 B.W.C.C. 113 .. 201, 206
Humphries *v.* Humphries, [1910] 2 K.B. 531; 21 Digest 177, *294*; 79 L.J.K.B. 919; 103 L.T. 14 .. 518, 520, 521, 523
Hyams *v.* Stuart King, [1908] 2 K.B. 696; 25 Digest 401, *58*; 77 L.J.K.B. 794; 99 L.T. 424 .. 559, 560

Imperial Gas Light & Coke Co. (Directors, etc.) *v.* Broadbent (1859), 7 H.L. Cas. 600; 28 Digest 391, *205*; 29 L.J. Ch. 377; 34 L.T.O.S. 1 .. 81, 87
Inche Noriah *v.* Shaik Allie Bin Omar, [1929] A.C. 127; Digest Supp.; 98 L.J.P.C. 1; 140 L.T. 121 .. 34, 35, 37
Income Tax Special Purposes Comrs. *v.* Pemsel, [1891] A.C. 531; 8 Digest 241, *1*; 61 L.J.Q.B. 265; 65 L.T. 621 .. 545, 547
India Rubber, Gutta Percha & Telegraph Works Co., Ltd. *v.* Chapman (1926), 20 B.W.C.C. 184; Digest Supp. .. 345, 346
Inglis *v.* Stock (1885), 10 App. Cas. 263; 39 Digest 530, *1433*; 54 L.J.Q.B. 582; 52 L.T. 821 .. 371, 372
Inland Revenue Commissioners *v.* Burrell, [1924] 2 K.B. 52; 28 Digest 108, *665*; 93 L.J.K.B. 709; 131 L.T. 727; 9 Tax Cas. 27 .. 276, 277
Inland Revenue Comrs. *v.* Ramsay (1935), 154 L.T. 141; Digest Supp.; 20 Tax Cas. 79 159, 161
Irish Land Comr. *v.* Ryan, [1900] 2 I.R. 565; 21 Digest 146, case *s* .. 519, 521

Jacobs *v.* Crédit Lyonnais (1884), 12 Q.B.D. 589; 11 Digest 396, *688*; 53 L.J.Q.B. 156; 50 L.T. 194 .. 207, 208, 209, 215, 518, 521, 539, 540, 543
Jeavons, *Re*, *Ex p.* Mackay, *Ex p.* Brown (1873), 8 Ch. App. 643; 7 Digest 23 *108*; 42 L.J. Bcy. 68; 28 L.T. 828; subsequent proceedings (1874), 9 Ch. App. 304 .. 652
Jenkins & Co. *v.* Simon, [1926] 1 K.B. 111; Digest Supp.; 95 L.J.K.B. 97; 134 L.T. 88 610, 611, 614
Jewsbury *v.* Mummery (1872), L.R. 8 C.P. 56; 21 Digest 177, *292*; 42 L.J.C.P. 22; 27 L.T. 618 .. 518, 523
John *v.* Dodwell & Co., [1918] A.C. 563; 43 Digest 535, *705*; 87 L.J.P.C. 92; 118 L.T. 661 .. 329, 330
Jones *v.* Lewis, [1919] 1 K.B. 328; 21 Digest 161, *219*; 88 L.J.K.B. 657; 120 L.T. 200 518, 520
Jones *v.* Westcomb (1711), Prec. Ch. 316; 44 Digest 1175, *10165* .. 664, 665, 666, 668
Jupiter, The, [1924] P. 236; Digest Supp.; 93 L.J.P. 156; 132 L.T. 624 .. 314, 318, 319
Justice *v.* James (1899), 15 T.L.R. 181; 31 Digest 270, *4147*; *on appeal from* 14 T.L.R. 385 .. 432, 436
Karflex, Ltd. *v.* Poole, [1933] 2 K.B. 251; Digest Supp.; 102 L.J.K.B. 475; 149 L.T. 140 714, 717, 718
Karori Borough *v.* Buxton, [1918] N.Z.L.R. 730 .. 207, 208
Ker *v.* Williams (1885), 29 Sol. Jo. 681 .. 518, 520
King, *Re*, Kerr *v.* Bradley, [1923] 1 Ch. 243; Digest Supp.; 92 L.J.Ch. 292; 128 L.T. 790 545, 547
King *v.* Foxwell (1876), 3 Ch. D. 518; 11 Digest 313, *45*; 45 L.J. Ch. 693 .. 618, 626
King *v.* King (1915), 32 T.L.R. 78; 27 Digest 482, *5110* .. 9, 18
Kingston's (Duchess) Case (1776), 1 East, P.C. 468; 21 Digest 159, *213* .. 518, 520, 523
Kubach *v.* Hollands (Allen (Frederick) & Son (Poplar), Ltd., Third Party), [1937] 3 All E.R. 907; Digest Supp. .. 383, 387

Laceby *v.* Lacon & Co., [1899] A.C. 222; 30 Digest 37, *293*; 68 L.J.Q.B. 480; 80 L.T. 473 .. 263, 268
Lainson *v.* Tremere (1834), 1 Ad. & El. 792; 21 Digest 254, *790*; 4 L.J.K.B. 207 397, 400, 402, 404
Lambert Bros., Ltd. *v.* Inland Revenue Commissioners (1927), 12 Tax Cas. 1053 .. 339, 341
Lancashire & Yorkshire Bank's Lease, *Re*, Davis (W.) & Son *v.* Lancashire & Yorkshire Bank, [1914] 1 Ch. 522; 31 Digest 439, *5853*; 83 L.J. Ch. 577; 110 L.T. 571 .. 324, 325
Langton *v.* Carleton (1873), L. R. 9 Exch, 57; 34 Digest 63, *387*; 43 L. J. Ex. 54; 29 L.T. 650 .. 324, 325
Langton *v.* Waite (1868), L.R. 6 Eq. 165; 42 Digest 810, *183*; 37 L.J. Ch. 345; 18 L.T. 80; *on appeal* (1869), 4 Ch. App. 402 .. 329, 330
Laprairie Common Corporation *v.* Compagnie de Jésus, [1921] 1 A.C. 314; 124 L.T. 482 .. 418, 420
Leather Cloth Co. *v.* Hieronimus (1875), L.R. 10 Q.B. 140; 39 Digest 386, *231*; 44 L.J.Q.B. 54; 32 L.T. 307 .. 553, 555
Lemm *v.* Mitchell, [1912] A.C. 400; 42 Digest 776, *2047*; 81 L.J.P.C. 173; 106 L.T. 359 .. 518, 520, 521
Levinger *v.* Licensees and General Insurance Co. (1936), 54 Ll. L.R. 68 .. 149, 150
Lord Advocate *v.* Macalister, [1924] A.C. 586; 21 Digest 107, *796*; 93 L.J.P.C. 220; 131 L.T. 545 .. 171, 176
Lovell, *Re*, Sparks *v.* Southall, [1920] 1 Ch. 122; 27 Digest 83, *649*; 88 L.J. Ch. 540; 122 L.T. 26 .. 69, 71
Lyons, *Re*, *Ex p.* Barclays Bank, Ltd. *v.* Trustee (1934), 152 L.T. 201; Digest Supp. .. 439, 443
M'Alister (or Donoghue) *v.* Stevenson, [1932] A.C. 562; Digest Supp.; 101 L.J.P.C. 119; 147 L.T. 281 .. 383, 384, 386, 387, 675, 676
McEuen, *Re*, McEuen *v.* Phelps, [1913] 2 Ch. 704; 23 Digest 464, *5359*; 83 L.J. Ch. 66; *sub nom. Re* McEwen, McEwen *v.* Phelps, 109 L.T. 701 .. 700, 709
McNicholas *v.* West Leigh Colliery Co., Ltd. (1933), 26 B.W.C.C. 29; Digest Supp. .. 583, 587
MacPherson *v.* Buick Motor Co. (1916), 217 N.Y. 382 .. 383, 386
Maddison *v.* Alderson (1883), 8 App. Cas. 467; 12 Digest 161, *1176*; 52 L.J.Q.B. 737; 49 L.T. 303; *affg.* (1881), 7 Q.B.D. 174 .. 553, 556

PAGES

Madras Official Assignee *v.* Mercantile Bank of India, Ltd., [1935] A.C. 53; Digest Supp.; 104 L.J.P.C. 1; 152 L.T. 170 .. 652
Magnolia Metal Co.'s Trade Marks, *Re*, [1897] 2 Ch. 371; 14 R.P.C. 621; 43 Digest 213, *583*; 66 L.J. Ch. 598; 76 L.T. 672 .. 24, 27, 28, 33
Maguire *v.* Liverpool Corpn., [1905] 1 K.B. 767; 26 Digest 400, *1255*; 74 L.J.K.B. 369; 92 L.T. 374 .. 589, 594
Maine Spinning Co. *v.* Sutcliffe & Co. (1917), 87 L.J.K.B. 382; 39 Digest 546, *1562*; 118 L.T. 351 .. 371, 372
Malfroot *v.* Noxal, Ltd. (1935), 51 T.L.R. 551; Digest Supp. .. 383, 387
Mallett *v.* Staveley Coal & Iron Co., Ltd., [1928] 2 K.B. 405; Digest Supp.; 97 L.J.K.B. 475; 139 L.T. 241; 13 Tax Cas. 772 .. 236, 239
Manchester Economic Building Society, *Re*, (1883), 24 Ch. D. 488; Digest, Practice, 806, *3685*; 53 L.J. Ch. 115; 49 L.T. 793 .. 97, 98
Manners *v.* Pearson & Son, [1898] 1 Ch. 581; 35 Digest 176, *57*; 67 L.J. Ch. 304; 78 L.T. 432 .. 571, 572
Marie Celeste Samaritan Society of London Hospital *v.* Inland Revenue Comrs. (1926), 43 T.L.R. 23; Digest Supp.; 11 Tax Cas. 226 .. 700, 703, 708, 713
Matson *v.* Trower (1824), Ry. & M. 17; 2 Digest 455, *1025* .. 154, 155
Maxwell's Will, *Re*, (1857), 24 Beav. 246; 44 Digest 954, *8072*; 26 L.J. Ch. 854; 30 L.T.O.S. 49 .. 465
Maynard *v.* Consolidated Kent Collieries Corporation, [1903] 2 K.B. 121; 39 Digest 255, *396*; 72 L.J.K.B. 681; 88 L.T. 676 .. 192, 196
Menzies *v.* M'Quibban (1900), 2 Fraser 732 .. 379, 381, 382
Merryweather *v.* Nixan (1799), 8 Term Rep. 186; 42 Digest 979, *95* .. 250, 253
Miller *v.* Cannon Hill Estates, Ltd., [1931] 2 K.B. 113; Digest Supp.; 100 L.J.K.B. 740; 144 L.T. 567 .. 390, 392, 394
Mills, *Re*, *Ex p.* Official Receiver (1888), 58 L.T. 871; 5 Digest 893, *7359* .. 439, 443
Mitchell *v.* Noble (B.W.), Ltd., [1927] 1 K.B. 719; Digest Supp.; 96 L.J.K.B. 484; 137 L.T. 33; 11 Tax Cas. 372 .. 236, 240
Montgomery *v.* Russell (1894), 11 T.L.R. 112 .. 518, 520
Moon *v.* Raphael (1835), 2 Bing. N.C. 310; 43 Digest 522, *597*; 5 L.J.C.P. 46 .. 329, 330
Moore, *Re*, Trafford *v.* Maconochie (1888), 39 Ch. D. 116; 27 Digest 82, *647*; 57 L.J. Ch. 936; 59 L.T. 681 .. 69, 71, 72
Morgan *v.* Leach (1842), 10 M. & W. 558; 26 Digest 458, *1749*; 12 L.J.M.C. 4 .. 589, 590
Morice *v.* Durham (Bp.) (1805), 10 Ves. 522; 43 Digest 582, *305* .. 291, 292
Morris *v.* Baron & Co., [1918] A.C. 1; 39 Digest 398, *341*; 87 L.J.K.B. 145; 118 L.T. 34 .. 553, 555, 556, 557
Morris *v.* Delobbel-Flipo, [1892] 2 Ch. 352; 7 Digest 19, *82*; 61 L.J. Ch. 518; 66 L.T. 320 .. 652
Mount Albert Borough Council *v.* Australasian Temperance & General Mutual Life Assurance Society, Ltd., [1937] 4 All E.R. 206; Digest Supp. .. 518, 526, 527, 528, 541, 543

National Provincial & Union Bank of England *v.* Charnley, [1924] 1 K.B. 431; Digest Supp.; 93 L.J.K.B. 241; 130 L.T. 465 .. 652
Neumann *v.* Inland Revenue Commissioners, [1934] A.C. 215; Digest Supp.; 103 L.J.K.B. 210; 150 L.T. 481; 18 Tax Cas. 332 .. 287, 289, 290
New York Life Insurance Co. *v.* Public Trustee, [1924] 2 Ch. 101; Digest Supp.; 93 L.J. Ch. 449; 131 L.T. 438 .. 208
Newington *v.* Levy (1870), L.R. 6 C.P. 180; 21 Digest 177, *291*; 40 L.J.C.P. 29; 23 L.T. 595 .. 518, 529
Newland *v.* Bell (1816), Holt, N.P. 221; 4 Digest 20, *117* .. 149, 150
Newton *v.* Guest, Keen & Nettlefolds, Ltd. (1926), 135 L.T. 386; Digest Supp.; 19 B.W.C.C. 119 .. 271, 272
Niblett *v.* Midland Ry. Co. (1907), 96 L.T. 462; 34 Digest 86, *639* .. 201, 205
Nicholson *v.* Southern Ry. Co. & Sutton & Cheam Urban District Council, [1935] 1 K.B. 558; Digest Supp.; 104 L.J.K.B. 265; 152 L.T. 349 .. 589, 590
Norman *v.* Baltimore & Ohio Ry. Co. (1935), 294 U.S. Rep. 240 .. 518, 520, 527
North of England Oil-Cake Co. *v.* Archangel Insurance Co. (1875), L.R. 10 Q.B. 249; 29 Digest 92, *495*; 44 L.J.Q.B. 121; 32 L.T. 561 .. 629
North Australian Territory Co., *Re*, Archer's Case, [1892] 1 Ch. 322; 9 Digest 488, *3201*; 61 L.J. Ch. 129; 65 L.T. 800 .. 329, 330
North Western Salt Co., Ltd. *v.* Electrolytic Alkali Co., Ltd., [1914] A.C. 461; 12 Digest 303, *2496*; 83 L.J.K.B. 530; 110 L.T. 852 .. 471

O'Connor & Brewin's Arbitration, *Re*, [1933] 1 K.B. 20; Digest Supp.; 101 L.J.K.B. 706; 147 L.T. 386 .. 510, 511
Ogle *v.* Vane (Earl) (1868), L.R. 3 Q.B. 272; 39 Digest 676, *2624*; 37 L.J.Q.B. 77 .. 553, 556
Oliver *v.* Nautilus Steam Shipping Co., [1903] 2 K.B. 639; 34 Digest 495, *4087*; 72 L.J.K.B. 857; 89 L.T. 318; 5 B.W.C.C. 65 .. 201, 202
Otto *v.* Bolton & Norris, [1936] 2 K.B. 46; Digest Supp.; [1936] 1 All E.R. 960; 105 L.J.K.B. 602; 154 L.T. 717 .. 383, 387
Ottoman Bank *v.* Chakarian, [1930] A.C. 277; Digest Supp.; 99 L.J.P.C. 97 .. 570, 571, 572, 581
Ottoman Bank of Nicosia *v.* Dascalopoulos, [1934] A.C. 354; Digest Supp.; 103 L.J.P.C. 73; 151 L.T. 151 .. 570, 571, 572, 580, 581, 582
Owen & Co. *v.* Cronk, [1895] 1 Q.B. 265; 10 Digest 792, *4974*; 64 L.J.Q.B. 288 .. 432, 436

Parlement Belge, The, (1880), 5 P.D. 197; 41 Digest 931, *8213*; 42 L.T. 273 .. 314, 318
Payne *v.* Esdaile (1888), 13 App. Cas. 613; 42 Digest 624, *254*; 58 L.J. Ch. 299; 59 L.T. 568 .. 207, 212
Peat (Sir William Henry) *v.* Gresham Trust, Ltd., [1934] A. C. 252; Digest Supp.; 151 L.T. 63; *sub nom. Re* M.I.G. Trust, Ltd., 103 L.J. Ch. 173 .. 439, 445
Peel's (Sir Robert) Settled Estates, *Re*, [1910] 1 Ch. 389; 40 Digest 679, *2151*; 79 L.J. Ch. 233; 102 L.T. 67 .. 64, 65
Pennock *v.* Pennock (1871) L.R. 13 Eq. 144; 37 Digest 396, *84*; 41 L.J. Ch. 141; 25 L.T. 691 .. 2, 3
Perrin *v.* Dickson, [1930] 1 K.B. 107; Digest Supp.; 98 L.J.K.B. 683; 142 L.T. 29; 14 Tax Cas. 608 .. 159, 161
Perry *v.* Equitable Life Assurance Society of U.S.A. (1929), 45 T.L.R. 468; Digest Supp. .. 571, 572

PAGES

Perry *v.* Wright, Cain *v.* Leyland & Co. (1900), Ltd., Bailey *v.* Kenworthy, Ltd., Gough *v.* Crawshay Brothers, Cyfartha, Ltd., [1908] 1 K.B. 441; 34 Digest 409, *3329*; 77 L.J.K.B. 236; 98 L.T. 327; 1 B.W.C.C. 351 .. .. .. 506, 507, 508, 509
Perry's Case (1935), 294 U.S. 307 .. .. 518, 520
Pettit, *Re*, Le Fevre *v.* Pettit, [1922] 2 Ch. 765; 39 Digest 167, *587*; 91 L.J. Ch. 732; 127 L.T. 491 .. .. 487, 488
Philippart *v.* Whiteley (William), Ltd., *Re* Philippart's Trade Mark "Diabolo," [1908] 2 Ch. 274; 25 R.P.C. 565; 43 Digest 141, *36*; 77 L.J. Ch. 650; 99 L.T. 291 .. 24, 26, 31
Piddington *v.* Co-operative Insurance Society, Ltd., [1934] 2 K.B. 236; Digest Supp.; 103 L.J.K.B. 370; 151 L.T. 399.. .. .. 149, 150
Pilbrow *v.* Pilbrow's Atmospheric Ry. Co. (1846), 3 C.B. 730; 9 Digest 675, *4502*; 16 L.J.C.P. 11; 8 L.T.O.S. 163.. .. .. 432, 437
Pitt, *Ex p.*, (1834), 5 B. & Ad. 1077; Digest Supp. 452, 455, 456, 463
Plevins *v.* Downing (1876), 1 C.P.D. 220; 39 Digest 549, *1581*; 45 L.J.Q.B. 695; 35 L.T. 263 .. .. 553, 555, 556
Porter, *Re*, Porter *v.* Porter, [1925] Ch. 746; Digest Supp.; 95 L.J. Ch. 46; 133 L.T. 812 .. .. 501, 502
Pounder, *Re*, Williams *v.* Pounder (1886), 56 L.J. Ch. 113; 37 Digest 399, *117*; 56 L.T. 104 2
Powles *v.* Innes (1843), 11 M. & W. 10; 29 Digest 90, *484*; 12 L.J. Ex. 163 629
Priestman *v.* Thomas (1884), 9 P.D. 210; 21 Digest 168, *251*; 53 L.J.P. 109; 51 L.T. 843 .. .. 518, 523
Pulford *v.* Pulford, [1923] P. 18; 27 Digest 307, *2846*; 92 L.J.P. 14; 128 L.T. 256 .. 471, 472

R. *v.* Baskerville, [1916] 2 K.B. 658; 14 Digest 463, *4934*; 86 L.J.K.B. 28; 115 L.T. 453 361
R. *v.* Bray (1862), 3 B. & S. 255; 14 Digest 210, *1926*; 32 L.J.M.C. 11; 7 L.T. 248.. 321, 323
R. *v.* Comptroller-General of Patents, *Ex p.* Muntz (1922), 127 L.T. 547; 36 Digest 609, *717*; 39 R.P.C. 335 .. .. 561, 562, 566
R. *v.* Creamer, [1919] 1 K.B. 564; 15 Digest 974, *10,898*; 88 L.J.K.B. 594; 120 L.T. 575 .. .. 471, 472
R. *v.* Davies (1930), 22 Cr. App. Rep. 33; Digest Supp. 361, 363
R. *v.* Inglewood (Mayor, etc.), [1931] N.Z.L.R. 177 .. .. 207, 208, 212
R. *v.* International Trustee for the Protection of Bondholders Akt., [1937] A.C. 500; [1937] 2 All E.R. 164; Digest Supp.; 106 L.J.K.B. 236; 156 L.T. 352; *affg.* [1936] 3 All E.R. 407 .. 208, 517, 519, 522, 525, 527, 528, 532, 533, 534, 535, 537, 571, 576
R. *v.* Langley (1923), 17 Cr. App. Rep. 199; 14 Digest 503, *5528* 100, 101
R. *v.* Llandilo Roads Comrs. (1788), 2 Term Rep. 232; 26 Digest 389, *1167* .. 589, 590, 594
R. *v.* London County Keepers of the Peace & JJ. (1890), 25 Q.B.D. 357; 26 Digest 460, *1760*; 59 L.J.M.C. 146; 63 L.T. 243 .. .. 452, 453, 460
R. *v.* Lordsmere (Inhabitants) (1886), 54 L.T. 766; 26 Digest 364, *892*.. .. .. 589, 590
R. *v.* Oxford & Witney Turnpike Roads Trustees (1840), 12 Ad. & El. 427; 26 Digest 375, *1006* 589, 590
R. *v.* Parkin (1928), 20 Cr. App. Rep. 173; Digest Supp. 100, 101
R. *v.* St. Pancras (Inhabitants) (1794), Peake, 286; 22 Digest 282, *2681*.. .. .. 518, 523
R. *v.* Thomas (1857), 7 E. & B. 399; 26 Digest 361, *871*; 28 L.T.O.S. 303 .. .. 589, 590
Ralli Brothers *v.* Compañia Naviera Sota y Aznar, [1920] 2 K.B. 287; 11 Digest 397, *699*; 89 L.J.K.B. 999; 123 L.T. 375 .. .. 208, 209, 518, 521, 526
Rayner *v.* Preston (1881), 18 Ch. D. 1; 29 Digest 308, *2546*; 50 L.J. Ch. 472; 44 L.T. 787 629
Redfern *v.* Redfern & Herbert (1890), 63 L.T. 780; Digest, Practice, 910, *4515*.. .. 468, 469
Refuge Assurance Co., Ltd. *v.* Kettlewell, [1909] A.C. 243; 35 Digest 71, *690*; 78 L.J.K.B. 519; 100 L.T. 306; *affg.*, [1908] 1 K.B. 545; 77 L.J.K.B. 421; 97 L.T. 896 .. 329, 330
Reid *v.* Stevenson, [1928] S.C. (Ct. of Sess.), 799; Digest Supp.. .. .. 201, 205
Reigate *v.* Union Manufacturing Co. (Ramsbottom), [1918] 1 K.B. 592; 12 Digest 347, *2888*; 87 L.J.K.B. 724; 118 L.T. 479.. 645
Reigate Corpn. *v.* Surrey County Council, [1928] Ch. 359; Digest Supp.; 97 L.J. Ch. 168; 138 L.T. 691 .. .. 589, 590
Remon *v.* City of London Real Property Co., [1921] 1 K.B. 49; 31 Digest 556, *7032*; 89 L.J.K.B. 1105; 123 L.T. 617.. .. .. 484, 486
Rice *v.* Reed, [1900] 1 Q.B. 54; 43 Digest 536, *712*; 69 L.J.Q.B. 33; 81 L.T. 410 .. 329, 330
Richards *v.* Goskar, [1936] 3 All E.R. 839; Digest Supp.; 29 B.W.C.C. 357 .. .. 583, 587
Richards, *Re*, Uglow *v.* Richards, [1902] 1 Ch. 76; 37 Digest 396, *86*; 71 L.J. Ch. 66; 85 L.T. 452 .. .. 2, 3
Roach *v.* Yates, [1937] 3 All E.R. 442; Digest Supp. 614, 615, 617
Robinson, *Re*, Besant *v.* German Reich, [1931] 2 Ch. 122; Digest Supp.; 100 L.J. Ch. 321; 145 L.T. 254 .. .. 291, 292
Rogerson *v.* Scottish Automobile & General Insurance Co., Ltd. (1931), 146 L.T. 26; Digest Supp. 629, 632, 633
Rose *v.* Ford, [1937] 3 All E.R. 359; Digest Supp.; 106 L.J.K.B. 576; 157 L.T. 174 383, 389, 614, 615, 617
Rouquette *v.* Overmann (1875), L.R. 10 Q.B. 525; 6 Digest 243, *1556*; 44 L.J.Q.B. 221; 33 L.T. 420 .. .. 207, 208
Royal Trust Co. *v.* A.-G. for Alberta, [1930] A.C. 144; Digest Supp. 208
Russell *v.* Russell, [1924] A.C. 687; Digest Supp.; 93 L.J.P. 97; 131 L.T. 482 424, 425, 427, 428, 429
Russian Commercial & Industrial Bank *v.* British Bank for Foreign Trade, Ltd., [1921] 2 A.C. 438; 35 Digest 170, *16*; 90 L.J.K.B. 1089; 126 L.T. 35.. .. .. 571, 572
Russian Oil Products, Ltd. *v.* Caucasian Oil Co., Ltd. (1928), 31 Ll. L. Rep. 109.. .. 154,155
Ryder, *Re*, Burton *v.* Kearsley, [1914] 1 Ch. 865; 37 Digest 396, *87*; 83 L.J. Ch. 653; 110 L.T. 970 .. .. 2, 3

Sacker *v.* Bessler & Co. (1887), 4 T.L.R. 17; Digest, Practice, 910, *4512* 468, 469
St. Helens Colliery Co. Ltd. *v.* Hewitson, [1924] A.C. 59; 34 Digest 280, *2364*; 93 L.J.K.B. 177; 130 L.T. 291; 16 B.W.C.C. 230.. .. .. 271, 272
St. Pierre *v.* South American Stores (Gath & Chaves), Ltd., and Chilean Stores (Gath & Chaves), Ltd., [1937] 3 All E.R. 349; Digest Supp.. .. .. 518, 520
Salt (Sir Titus), Sons & Co.'s Application, *Re*, [1894] 3 Ch. 166; 11 R.P.C. 517; 43 Digest 146, *74*; 63 L.J. Ch. 756; 71 L.T. 386 .. .. 24, 26, 33
Sandgate Urban District Council *v.* Kent County Council (1898), 79 L.T. 425; 26 Digest 265, *65* 589, 590, 594

PAGES

Sanford, *Re*, Sanford *v.* Sanford, [1901] 1 Ch. 939; 37 Digest 397, *92*; 70 L.J. Ch. 591; 84 L.T. 456 .. .. 2, 3
Scarf *v.* Jardine (1882), 7 App. Cas. 345; 21 Digest 224, *577*; 51 L.J.Q.B. 612; 47 L.T. 258 .. .. 329, 330
Schnapper, *Re*, Westminster Bank, Ltd. *v.* Schnapper, [1936] 1 All E.R. 322; Digest Supp. 133, 138
Scholefield *v.* Redfern (1863), 2 Drew. & Sm. 173; 40 Digest 678, *2143*; 32 L.J. Ch. 627; 8 L.T. 487 .. .. 64, 65
Schwann *v.* Cotton, [1916] 2 Ch. 459; 19 Digest 52, *291*; 85 L.J. Ch. 689; 115 L.T. 168 349, 357
Scott *v.* Ebury (Lord) (1867), L.R. 2 C.P. 255; 10 Digest 1173, *8325*; 36 L.J.C.P. 161; 15 L.T. 506 .. .. 432, 437
Searle, *Re*, Brooke *v.* Searle, [1912] 1 Ch. 610; 31 Digest 439, *5851*; 81 L.J. Ch. 375; 106 L.T. 458 .. .. 324, 325
Secretary of State in Council of India *v.* Scoble, [1903] A.C. 299; 28 Digest 65, *337*; 72 L.J.K.B. 617; 89 L.T. 1; 4 Tax Cas. 618.. .. .. 159, 161
Selous, *Re*, Thomson *v.* Selous, [1901] 1 Ch. 921; 43 Digest 667, *986*; 70 L.J. Ch. 402; 84 L.T. 318 .. .. 501, 504
Selwyn (A. H.), Ltd. *v.* Baker, [1924] W. N. 195; Digest, Practice, 806, *3692* 97, 99
Serbian Loans Case (1929), Permanent Court of International Justice, Series A, No. 14, p. 5 .. .. 518, 519, 520, 521, 535, 537
Sharpness New Docks & Gloucester & Birmingham Navigation Co. *v.* A.-G., [1915] A.C. 654; 26 Digest 581, *2716*; 84 L.J.K.B. 907; 112 L.T. 826; *revsg.* S.C., [1914] 3 K.B. 1 .. .. 589 590
Shelfer *v.* City of London Electric Lighting Co., Meux's Brewery Co. *v.* City of London Electric Lighting Co., [1895] 1 Ch. 287; 28 Digest 415, *408*; 64 L.J. Ch. 216; 72 L.T. 34 .. .. 81, 87
Shuker's Estate, *Re*, Bromley *v.* Reed, [1937] 3 All E.R. 25; Digest Supp... .. .. 1, 2, 3
Simpson *v.* Metropolitan Water Board (1917), 15 L.G.R. 629; 43 Digest 1099, *289* .. 639, 642
Six Carpenters' Case (1610), 8 Co. Rep. 146 *a*; 29 Digest 18, *236*.. .. .. .. 106, 108
Slee, *Re*, *Ex p.* North Western Bank (1872), L.R. 15 Eq. 69; 7 Digest 27, *135*; 42 L.J. Bcy. 6; 27 L.T. 461 652
Smart *v.* Lincolnshire Sugar Co., Ltd. (1935), 154 L. T. 167; Digest Supp.; *affd.*, [1937] 1 All E.R. 413; 20 Tax Cas. 643; [1937] A.C. 697; 106 L.J.K.B. 185; 156 L.T. 215 339, 341
Smith *v.* Baker (1873), L.R. 8, C.P. 350; 43 Digest 536, *711*; 42 L.J.C.P. 155; 28 L.T. 637 .. .. 329, 330
Solicitor, *Re* A, [1934] 2 K.B. 463; Digest Supp.; 103 L.J.K.B. 719; 152 L.T. 22 452, 453, 459
Solicitor, *Re* A, *Ex p.* Incorporated Law Society, [1903] 1 K.B. 857; *affd.*, [1903] 2 K.B. 205; Digest Supp.; 72 L.J.K.B. 643; 89 L. T. 118 .. .. 452, 455, 458, 463
Solicitor (No. 2), *Re* A, (1924), 93 L.J.K.B. 761; 42 Digest 408, *4653*; 131 L.T. 155 452, 453
Solloway *v.* Johnson, [1934] A.C. 193; Digest Supp.; 103 L.J.P.C. 49; 150 L.T. 421 .. 329, 330
South American & Mexican Co., *Re*, *Ex p.* Bank of England, [1895] 1 Ch. 37; 10 Digest 926, *6349* 64 L.J. Ch. 189; 71 L.T. 594 .. .. 518, 520
Southwell *v.* Savill Brothers, Ltd., [1901] 2 K.B. 349; 28 Digest 57, *288*; 70 L.J.K.B. 815; 85 L.T. 167; 4 Tax Cas. 430 .. .. 236, 240
Spiers *v.* Hunt, [1908] 1 K.B. 720; 12 Digest 267, *2188*; 77 L.J.K.B. 321; 98 L.T. 27 69, 73
Spiller *v.* Maude (1881), 32 Ch. D. 158, *n.*; 8 Digest 348, *1412* 545, 547
Spreckley *v.* Leicestershire County Council, [1934] 1 K.B. 366; Digest Supp.; 103 L.J.K.B. 200; 150 L.T. 9 .. .. 510, 511
Spurrier *v.* La Cloche, [1902] A.C. 446; 11 Digest 389, *644*; 71 L.J.P.C. 101; 86 L.T. 631 .. .. 208, 209
Stainton *v.* Woolrych, Stainton *v.* Metropolitan Board of Works & Lewisham District Board of Works (1857), 23 Beav. 225; 28 Digest 468, *780*; 26 L.J. Ch. 300; 28 L.T.O.S. 333 .. .. 349, 357
Stanford, *Re*, Cambridge University *v.* A.-G., [1924] 1 Ch. 73; Digest Supp.; 93 L.J. Ch. 109; 130 L.T. 309 .. .. 545, 547
Stanley (G.) & Co., *Re*, [1925] Ch. 148; Digest Supp.; 94 L.J. Ch. 187; 133 L.T. 37 439, 443
Stead *v.* Dawber (1839), 10 Ad. & El. 57; 39 Digest 665, *2545*; 9 L.J.Q.B. 101 .. 553, 555
Steele, *Re*, *Ex p.* Conning (1873), L.R. 16 Eq. 414; 7 Digest 23, *109*; 42 L.J. Bcy. 74 652
Stephens *v.* Mysore Reefs (Kangundy) Mining Co., Ltd., [1902] 1 Ch. 745; 9 Digest 83, *325*; 71 L.J. Ch. 295; 86 L.T. 221 .. .. 545, 547
Storey *v.* Fulham Steel Works Co. (1907), 24 T.L.R. 89; 12 Digest 377, *3121* .. 201, 205
Stroughill *v.* Buck (1850), 14 Q.B. 781; 21 Digest 252, *771*; 19 L.J.Q.B. 209; 15 L.T.O.S. 22 .. .. 397, 401, 403
Sturt *v.* Taylor (1931), Unreported 475
Sudeley (Lord) *v.* A.-G., [1897] A.C. 11; 23 Digest 463, *5354*; 66 L.J.Q.B. 21; 75 L.T. 398; *affg.* S.C., [1896] 1 Q.B. 354 .. .. 700, 704, 705
Sutherland *v.* Stopes, [1925] A.C. 47; 32 Digest 142, *1739*; 94 L.J.K.B. 166; 132 L.T. 550; *revsg.* S.C. (1923), 39 T.L.R. 677 .. .. 475, 476
Sutherland Publishing Co., Ltd. *v.* Caxton Publishing Co., Ltd., [1936] Ch. 323; [1936] 1 All E.R. 177; Digest Supp.; 105 L.J. Ch. 150; 154 L.T. 367 .. .. .. 406, 407
Swiss Bank Corpn. *v.* Boehmische Industrial Bank, [1923] 1 K.B. 673; Digest Supp.; 92 L.J.K.B. 600; 128 L.T. 809 208
Sydney Municipal Council *v.* Bourke, [1895] A.C. 433; 26 Digest 400, *1254*; 64 L.J.P.C. 140; 72 L.T. 605 .. .. 589, 590
Sydney Municipal Council *v.* Young, [1898] A.C. 457; 26 Digest 329, *616 i* 5, 7

Tattersall *v.* Drysdale, [1935] 2 K.B. 174; Digest Supp.; 104 L.J.K.B. 511; 153 L.T. 75 .. .. 629, 632, 633
Taxes Commissioner *v.* Melbourne Trust, Ltd., [1914] A.C. 1001; 28 Digest 18, case *92 i*; 84 L.J.P.C. 21 .. .. 339, 341, 342
Taylor *v.* Hollard, [1902] 1 K.B. 676; 11 Digest 407, *759*; 71 L.J.K.B. 278; 86 L.T. 228 208
Thomas *v.* Ketteriche (1749), 1 Ves. Sen. 333; 23 Digest 239, *2909* 518, 523
Thompson *v.* Lacy (1820) 3 B. & Ald. 283; 29 Digest 2, *3* 106, 108, 111
Thompson *v.* Maberly (1811), 2 Camp. 573; 31 Digest 439, *5847* 324, 325
Thomson *v.* Shakespear (1860), 1 De G. F. & J. 399; 8 Digest 264, *261*; 29 L.J. Ch. 276; 2 L.T. 479 .. .. 501, 502
Thomson's Estate, *Re*, Herring *v.* Barrow (1879), 13 Ch. D. 144; (1880), 14 Ch. D. 263; 37 Digest 396, *85*; 49 L.J. Ch. 622; 43 L.T. 35 .. .. 1, 2, 3, 4

PAGES

Timmins *v.* Brodsworth Main Colliery Co., Ltd., [1934] 2 K.B. 361; Digest Supp.; 103 L.J.K.B. 707; 151 L.T. 231; 27 B.W.C.C. 283 .. 583, 587
Todrick *v.* Halliday, [1928] S.C. (J.) 61; Digest Supp. .. 220, 222
Tuck *v.* America-Levant Line, Unreported .. 305, 309
Tyers *v.* Rosedale & Ferryhill Iron Co. (1875), L.R. 10 Exch. 195; 39 Digest 571, *1762*; 44 L.J. Ex. 130; 33 L.T. 56 .. 553, 555

Udny *v.* Udny (1869), L.R. 1 Sc. & Div. 441; 11 Digest 309, *19* .. 618, 625, 626, 627
Unite, *Re*, Edwards *v.* Smith (1906), 75 L.J. Ch. 163; Digest Supp. .. 501, 502
Utrillo *v.* Manson and Waterlow (1937), *Times* Newsp., June 8 .. 294

Valery *v.* Scott (1876), 13 Sc. L.R. 622; 11 Digest 392, case *p* .. 207, 208
Van den Berghs, Ltd. *v.* Clark, [1935] A.C. 431; Digest Supp.; 104 L.J.K.B. 345; 153 L.T. 171; 19 Tax Cas. 390 .. 236, 240
Verge *v.* Somerville, [1924] A.C. 496; Digest Supp.; 93 L.J.P.C. 173; 131 L.T. 107 545, 547

W——, M. J. *v.* W——, H. R. W., [1936] P. 187; [1936] 2 All E.R. 1112; Digest Supp.; 105 L.J.P. 97; 155 L.T. 319 .. 9, 10
Wahl *v.* Inland Revenue Comrs. (1933), 149 L.T. 203; Digest Supp.; 17 Tax Cas. 744 700, 703
Wallis, *Re*, *Ex p.* Sully (1885), 14 Q.B.D. 950; 4 Digest 21, *134* .. 149, 150
Walters *v.* Rank (Joseph), Ltd. (1923), 39 T.L.R. 255; 41 Digest 471, *3030* .. 305, 307
Wanganui-Rangitikei Electric Power Board *v.* Australian Mutual Provident Society (1934), 50 C.L.R. 581 .. 207, 208, 209, 218
Wanklyn *v.* Wilson (1887), 35 Ch. D. 180; 5 Digest 476, *1403*; 56 L.J. Ch. 209; 56 L.T. 52 .. 439, 445, 446
Warburton *v.* Co-operative Wholesale Society, Ltd., [1917] 1 K.B. 663; 12 Digest 378, *3122*; 86 L.J.K.B. 529; 116 L.T. 107; 10 B.W.C.C. 93 .. 201, 205
Warren, *Re*, *Ex p.* Trustee, [1900] 2 Q.B. 138; 5 Digest 893, *7360*; 82 L.T. 502 .. 439, 443
Warren *v.* Warren, [1925] P. 107; Digest Supp.; 94 L.J.P. 68; 133 L.T. 352 .. 424, 429
Wemyss *v.* Wemyss's Trustees, [1921] S.C. 30; 44 Digest 443, case *b* .. 310
Whaite *v.* Lancashire & Yorkshire Ry. Co. (1874), L.R. 9 Exch. 67; 8 Digest 51, *335*; 43 L.J. Ex. 47; 30 L.T. 272 .. 305, 308
Whyler *v.* Bingham Rural Council, [1901] 1 K.B. 45; 26 Digest 389, *1168*; 70 L.J.Q.B. 207; 83 L.T. 652 .. 589, 590, 596
Widmore *v.* Woodroffe (1766), Amb. 636; 44 Digest 890, *7482* .. 342, 343
Wilkinson, *Re*, Page *v.* Public Trustee, [1926] Ch. 842; 44 Digest 442, *2678*; 95 L.J. Ch. 528; 135 L.T. 736 .. 310, 311
Williams *v.* Arkle (1875), L.R. 7 H.L. 606; 23 Digest 469, *5380*; 45 L.J. Ch. 590; 33 L.T. 187 .. 465
Wills, *Re*, Wills *v.* Hamilton, [1915] 1 Ch. 769; 23 Digest 465, *5363*; 84 L.J. Ch. 580; 113 L.T. 138 .. 700, 709
Wilson *v.* Carnley, [1908] 1 K.B. 729; 12 Digest 267, *2189*; 77 L.J.K.B. 594; 98 L.T. 265 .. 69, 73
Wilsons & Clyde Coal Co., Ltd. *v.* Flynn, [1930] A.C. 516; Digest Supp.; 99 L.J.P.C. 139; 143 L.T. 362; 23 B.W.C.C. 159 .. 583, 586, 587
Winans *v.* A.-G., [1904] A.C. 287; 11 Digest 312, *38*; 73 L.J.K.B. 613; 90 L.T. 721; *revsg.* S.C. (1901), 85 L.T. 508 .. 618, 624, 625
Winans *v.* R., [1908] 1 K.B. 1022; 21 Digest 5, *1*; *affd.*, [1910] A.C. 27; 21 Digest 5, *1*; 79 L.J.K.B. 156; 101 L.T. 754 .. 208
Wing *v.* Soar (1926), Unreported .. 220, 222, 226, 227
Wolverton *v.* A.-G., [1898] A.C. 535; 21 Digest 90, *660*; 67 L.J.Q.B. 829; 79 L.T. 58 171, 182
Workington Harbour & Dock Board *v.* Trade Indemnity Co., Ltd. (No. 2), [1937] 3 All E.R. 139; Digest Supp. .. 517, 519, 522
Wright, *Re*, Mott *v.* Issott, [1907] 1 Ch. 231; 44 Digest 468, *2883*; 76 L.J. Ch. 89; 95 L.T. 697 .. 310
Wrightson *v.* McArthur & Hutchisons, [1921] 2 K.B. 807; Digest Supp.; 90 L.J.K.B. 842; 125 L.T. 383 .. 652

Yeap Cheah Neo *v.* Ong Cheng Neo (1875), L.R. 6 C.P. 381; 43 Digest 719, *1571* 465, 466
Yorkshire Provident Life Assurance Co. *v.* Gilbert & Rivington, [1895] 2 Q.B. 148; Digest, Pleading, 207, *1740*; 64 L.J.Q.B. 578; 72 L.T. 445 .. 293, 294
Young *v.* Raincock (1849), 7 C.B. 310; 21 Digest 287, *1018*; 18 L.J.C.P. 193; 13 L.T.O.S. 401 .. 397, 401, 403

Zierenberg *v.* Labouchère, [1893] 2 Q.B. 183; 32 Digest 99, *1310*; 63 L.J.Q.B. 89; 69 L.T. 172 .. 293, 294

CORRIGENDA.

P. 48. Digest reference. Read: FOR CASES, see DIGEST, Street Traffic, No. 232*n*.
P. 334. Headnote: l. 2 read: applicants' yard; ll. 2 and 3 read: they borrowed three of the applicant's workmen; l. 10 read: the applicants were the employers.
P. 439. *Re* Conley. Counsel for Mrs. Bessie Cohen was *V. R. Aronson.*

INDEX

PAGE

Accomplice, absence of direction as to corroboration 360

Adjudication, necessity for, voluntary conveyance of shares 191

Advances, overdraft or loan, trust receipts, equitable charge or declaration of trust 651

Agent, sole, contract to push sales .. 118

AGRICULTURE.

Agricultural holding—Compensation for disturbance—Notice to quit—Whether land cultivated according to rules of good husbandry—Expenses of tenant in consulting a surveyor—Whether expenses incurred in preparation of a claim for compensation—Agricultural Holdings Act, 1923 (*c.* 9), *s.* 12 (6) [DUNSTAN *v.* BENNEY] 510

Alimony, where wife bankrupt and entitled to income from settlement .. 635

Annuity, policy, stamp duty 159

Appointment, power of, power to deal with capital of legacy 1

——, receiver under debenture deed, necessity for proof.. 374

——, umpire, notice of 154

Apportionment, dividends, securities sold immediately after death of tenant for life 63

ARBITRATION.

Appointment of arbitrator—Notice to parties—Appointment of third arbitrator—Umpire—Whether notice necessary—Custom—Arbitration Act, 1934 (*c.* 14), *s.* 4 (1) [*Re* AN ARBITRATION BETWEEN BRITISH METAL CORPORATION, LTD., AND LUDLOW BROS. (1913), LTD.] 154

Attorney, deed executed under power of, necessity to abstract power.. 447

Average weekly earnings, spread-over arrangement 505

Bank, liability of catchment board for repair 684

Bank, overdraft secured by deposit of documents, fraudulent preference .. 438

—— regulations, how far bank bound to observe 90

BANKERS.

Advances—Secured by trust receipts—Produce in warehouse purchased with money advanced to be held as agent for or in trust for bank—Whether equitable charge or declaration of trust [MERCANTILE BANK OF INDIA, LTD. *v.* CHARTERED BANK OF INDIA, AUSTRALIA & CHINA, AND STRAUSS & CO., LTD. (IN LIQUIDATION) (NO. 2), CHARTERED BANK OF INDIA, AUSTRALIA & CHINA *v.* MERCANTILE BANK OF INDIA, LTD., AND STRAUSS & CO., LTD. (IN LIQUIDATION) (NO. 2)] .. 651

Crossed cheques—Third-party cheque indorsed by customer to himself—Forged indorsement—Extent of bank's inquiry—How far bank bound to observe its own regulations [MOTOR TRADERS GUARANTEE CORPORATION, LTD. *v.* MIDLAND BANK, LTD.] 90

BANKRUPTCY.

Bankrupt married woman—Income under settlement provided by husband subject to restraint on anticipation — Alimony pendente lite—Proportion of income to be made available for creditors—Means of subsistence — Bankruptcy Act, 1914 (*c.* 59), *s.* 52 [*Re* LADY MARY BOWDEN, described in the receiving order as LADY MURIEL BOWDEN, TRUSTEE IN BANKRUPTCY *v.* THE BANKRUPT AND ANOTHER] 635

Fraudulent preference—Bank overdrafts secured by mere deposit of documents of third party without any agreement to pay sums owing—Account put into credit and documents released immediately before bankruptcy—Absence of contractual relationship between depositor and creditor—Surety or guarantor—Bankruptcy Act, 1914 (*c.* 59), *s.* 44 [*Re* CONLEY (TRADING AS CAPLAN AND CONLEY), *Ex p.* THE TRUSTEE *v.* BARCLAYS BANK, LTD.].. 438

Undischarged bankrupt—Obtaining credit to the extent of £10 or upwards without disclosure—Sale of land and business—Purchase price payable by instalments—Bankruptcy Act, 1914 (*c.* 59), *s.* 155 [DE CHOISY *v.* HYNES] 54

Bias, licensing justices on city council, town planning 114

Bill of lading, certificate of surveyor, whether conclusive 304

Bribery of employees, unsuccessful, *quia timet* action 279

Business, other than usual, use of car in, avoidance of insurance.. 149

Capital expenditure, trade association, money spent to avoid competition .. 236

Carrier's licence, transfer, when inquiry may be held 664

Catchment board, liability for repair of bank, flood works.. 684

Charges, pending, taking into consideration, jurisdiction of court 327

CHARITIES.

Charitable purpose—War memorial—Memorial of use to the living—Memorial hall [MURRAY *v.* THOMAS] 545

Charity, established in United Kingdom, exemption from income tax.. 290

Cinema, licence, proposed to be built .. 263

Claim, preparation of, expenses of surveyor, compensation for disturbance .. 510

Coal mine, dangerous machinery, fencing 219

Collect, agreement to, when property passes 645

Collier, minimum wage, jurisdiction of trade tribunal.. 597

Collusion, money received on signing petition 9

COMPANIES.

Receiver and manager—Appointed by the court—Liability—Rent—Whether personally liable [CONSOLIDATED ENTERTAINMENTS, LTD. *v.* TAYLOR] 432

Transfer of shares—Registration—Refusal to register—Duly stamped—Voluntary transfer—No adjudication Stamp [CONYBEAR *v.* BRITISH BRIQUETTES, LTD.].. 191

Winding up—Misfeasance—Remuneration paid to director—Invalid resolution—Relief from liability—Fairly to be excused—Invalid appointment of director—Companies Act, 1929 (*c.* 23), *s.* 372 [*Re* J. FRANKLIN & SON, LTD.].. 43

Company, acquisition of 90 per cent. of shares in another company, stamp duty.. 227

——, undistributed profits, liquidation, liability of shareholders to sur-tax .. 275

Compensation, action barred by right to compensation, public works 348

——, disturbance, calling in surveyor to report on system of cultivation.. .. 510

——, injurious affection, ribbon development 142

Compulsory purchase, educational property, return of Treasury grant, whether confirmation of order consent to sale 197

PAGE

——, planning scheme, open space, compensation for loss of expected profit, whether recoverable 189
Condition, implied, of title, hire purchase 713
——, subsequent, will, residence upon property and not allowing named person thereon 309
Consent to sale, confirmation of compulsory purchase order, whether consent 197
Container, price for milk to be made into cream 669
Continuation order, detention of defective, made after expiration of previous order 163

CONTRACT.

Contract required to be in writing—Variation—Whether variation required to be in writing—Mere forbearance to insist on actual terms—Instalment deliveries under a contract for the sale of goods—Sale of Goods Act, 1893 (*c.* 71), *s.* 4 [BESSLER, WAECHTER, GLOVER & CO. *v.* SOUTH DERWENT COAL CO., LTD.] 552
Illegal contract—Future separation of husband and wife—Averment that wife at all times ready to rejoin husband—No evidence of immoral purpose—Public policy [DAVIES *v.* ELMSLIE] 68, 471
Convenience, rule of, "relations" 342
Conversion, copyright, damages, limitation of action 405
——, of shares by stockbroker, measure of damages 328

COPYRIGHT.

Infringement—Conversion—Limitation of action—Assessment of damages for conversion—Copyright Act, 1911 (*c.* 46), *s.* 10 [SUTHERLAND PUBLISHING CO., LTD. *v.* CAXTON PUBLISHING CO., LTD. (No. 2)] 405
Copyright, unprotected matter, discovery 366
Corroboration, absence of direction as to 360
Costs, of appeal, security for, costs below unpaid 230
——, remitted action, discretion of county court judge as to costs before remission 610
Counsel, divisional court, whether exclusive right of audience 451

COUNTY COURTS.

Costs—Remitted action—Costs in High Court—Discretion of county court judge to give county court costs only—County Courts Act, 1934 (*c.* 53), *ss.* 47, 73 [GOADBY *v.* ORRIDGE] 610
——*Scale items—Fees beyond maxima given in scale—Power of registrar on taxation and of judge on review—Limitation to maxima—C.C.R.*, 1937, *Ord.* 47 [MURRAY *v.* REDPATH, BROWN & CO., LTD.] 478
Proper court for commencement of action—Action founded on a contract of sale of goods to be paid by instalments—Contract of guarantee—District in which cause of action wholly or in part arose—C.C.R., 1936, *Ord.* 2, *r.* 1 [R. *v.* SHOREDITCH COUNTY COURT REGISTRAR, *Ex parte* SAXON FINANCE CORPORATION, LTD.] 231
Court of Appeal, varying apportionment of blame 249
Creditors, making income subject to restraint on anticipation available for .. 635

CRIMINAL LAW.

Accomplice — Corroboration — Absence of direction to jury—Power of Court of Criminal Appeal to confirm conviction—No miscarriage of justice—Criminal Appeal Act, 1907 (*c.* 23), *s.* 4 (1) [R. *v.* LEWIS] 360

PAGE

Appeal—Certificate for appeal—Mere possibility of injustice—Whether certificate ought to be granted [R. *v.* BOSELEY] .. 100
Bill of indictment—Preferment—No committal for trial—Application to judge in chambers—Discretion of judge—Inquiry into exercise of discretion—Administration of Justice (Miscellaneous Provisions) Act, 1933 (*c.* 36), *s.* 2 [R. *v.* ROTHFIELD] 320
Sentence—Taking into account other charges—Charges beyond the jurisdiction of the court passing sentence [R. *v.* WARN] 327
Crossed cheque, extent of inquiry by bank 90

CROWN PRACTICE.

Writs of certiorari *and* mandamus—*When issued—Justices sitting in a judicial capacity* [R. *v.* BARNSTAPLE JUSTICES, *Ex parte* CARDER] 263
Currency, contract with Turkish bank, pension based on salary 570
Currency, see MONEY.

Damages, apportionment of blame, motor car accident, varying proportions .. 249
——, back, infringement of patent before amendment 295
——, for conversion, copyright, measure of 405
——, shortened expectation of life, girl of 8 years of age 614
Dangerous machinery, mill gearing, absolute duty to fence 58
Debentures, identical, judgment on one, estoppel 516
——, interest, effect of legislation in foreign jurisdiction 206
Decontrol, trespasser in possession .. 483
Deduction, trade association, expenditure to reduce competition 236
Defective, detention order, time for continuation order 163
Delivery, instalment, verbal agreement to vary 552
——, time for, sale for Saturday's steamer 371
Dentist, medical practitioner not on dentists' register, treatment of panel patient 184
Deposit of documents, overdraft secured by fraudulent preference 438
Director, invalid appointment, relief in respect of misfeasance 43
Disciplinary Committee, applicant's right to a hearing 451
Disclosure, undischarged bankrupt, purchase price payable by instalments .. 54

DISCOVERY

Production of documents—Incriminating matter—Matter relevant to issues raised by defence—Part of poem—Alleged scandalous matter disentitling author to copyright [SITWELL *v.* SUN ENGRAVING CO., LTD.] 366
Divisional court, appearance in person .. 451

DIVORCE.

Collusion — Constraint of petitioner — Money payment to secure signing of petition — Unreality of proceedings [WOODS *v.* WOODS] 9
Domicil—Abandonment of domicil of origin—Acquiring fresh domicil—"Intention of permanent or indefinite residence"—Onus of proof—Evidence—Declaration of parent for obtaining naturalisation—Admissibility [GULBENKIAN *v.* GULBENKIAN] 618
Doctor, and patient, undue influence .. 34
——, partnership, signing medical certificate 242
Domestic purposes, purity of water supply 675
Domicil, onus of proof, admissibility of declarations on naturalisation 618

DOMINIONS.

Effect of retrospective legislation—Whether contract governed by English, Canadian, or New Brunswick law—Validity of New Brunswick legislation—Federal Gold Clauses Obligations Act of Canada, 1937 (*c.* 37)—*Gold Clauses Act of New Brunswick,* 1937 (*c.* 45) [British & French Trust Corporation *v.* New Brunswick Railway Co.] 516

Double taxation, relief, Indian company with shares in English company 286

EDUCATION.

Land acquired for educational purposes—Treasury grant—Compulsory purchase by local authority—Confirmation order—Whether consent to sale—Payment into court of purchase money—School Grants Act, 1855 (*c.* 131) [*Re* Mill Lane Land, Everton, *Re* Liverpool Education (Emmanuel School Purchase) Order, 1929, *Ex parte* Liverpool Corporation] 197

Emergency, acts in, workmen's compensation 379

Employee, invention by, right of employer to assignment of patent 693

Equitable charge, trust receipt for produce in warehouse 651

EQUITY.

Quia timet *action—Attempted bribery of employees — Attempts unsuccessful — Right to injunction* [Scophony, Ltd. *v.* Traub and Others] 279

Erection, in course of, meaning of 390

ESTATE AND OTHER DEATH DUTIES.

Succession duty—Predecessor—Settlement by party with defeasible estate and party with contingent interest subject thereto—Succession Duty Act, 1853 (*c.* 51), *s.* 2 [*Re* Drake's Settlement Trusts, Wilson *v.* Drake] 171

ESTOPPEL.

Estoppel by deed—Effect of recital [Greer *v.* Kettle, *Re* Parent Trust & Finance Co., Ltd.] 396

Estoppel by record—Judgment in default of a defence—Judgment upon one of a series of like debentures—Identity of debentures not pleaded in previous action [British & French Trust Corporation *v.* New Brunswick Railway Co.] 516

EXECUTION.

Seizure by creditor—Claim by receiver under debenture deed—Necessity for receiver to prove that power to appoint has arisen [Kasofsky *v.* Kreegers (Phillips, Claimant)] 374

Executors, when taking residue beneficially 464

Extortion, reporting defaulter to Tattersalls 559

FACTORIES AND SHOPS.

Dangerous machinery — Fencing — Unfenced mill gearing—Absolute duty to fence—Injury to workman—Factory and Workshop Act, 1901 (*c.* 22), *s.* 10 (1) (*c*) [Findlay *v.* Newman, Hender & Co., Ltd.] 58

Fencing, mill gearing, absolute duty 58

FOOD AND DRUGS.

Marketing scheme—Fixing prices—Sterilised cream put into bottles—Price fixed for "tinned cream"—Whether applicable to sterilised cream in bottles [Dried Milk Products, Ltd. *v.* Milk Marketing Board] 669

Forbearance, to insist on actual terms of contract, whether variation 552

Foreign government, impleading 313

Fraudulent preference, overdraft secured by deposit of documents 438

GAMING.

Recovery of winnings—New consideration—Forbearing to report defaulter to Tattersalls—Whether illegal as extortion—Larceny Act, 1916 (*c.* 50), *s.* 31 [Burden *v.* Harris] 559

Geographical name, invented word 23

German currency, sum payable under family agreement, rate of exchange 133

Gold clause, redemption of debenture, estoppel 516

GUARANTEE.

Guarantee of secured loan—Whether security for loan a condition precedent—Usual clause for guarantors to be liable as principal debtors [Greer *v.* Kettle, *Re* Parent Trust & Finance Co., Ltd.] 396

Guarantee, instalment payments, county court in which action commenced 231

Hand-signals, motor vehicles, whether necessary in addition to stop-light 249

Harter Act, compliance with, bill of lading 304

Highway, erection on, rights of soil owner in trespass 5

HIGHWAYS.

Road supported by retaining-wall—Main road—Wall old but still capable of supporting highway—Non-feasance—Raising level of road—Misfeasance—Amount of repair necessary—Whether altered by Local Government Act, 1929 (*c.* 17), *s.* 29 [Attorney-General (at the relation of Omerod Taylor & Son, Ltd.) and Omerod Taylor & Son, Ltd. *v.* Todmorden Borough Council] 588

Street works—Private street—Provisional apportionment of expenses—Basis of apportionment—Sufficiency of particulars—Birkenhead Improvement Act, 1884 (*c. lvi*), *s.* 21, *Sched. II* [Smith *v.* Birkenhead Corpn.] 75

HIRE PURCHASE.

Implied condition—Title of owners—Material date when title must be shown—Commencement of bailment—Date of delivery [Mercantile Union Guarantee Corporation, Ltd. *v.* Wheatley] 713

House, whether completed or in course of erection 390

Housing accommodation, provision of, powers of London County Council 678

HUSBAND AND WIFE.

Summons for maintenance on ground of desertion — Defence of adultery — Admissibility of wife's statement reflecting on paternity of child—Rule in Russell v. Russell—Summons dismissed—Wife's costs [Roast *v.* Roast] 423

Husband and wife, future separation of, contract, illegality 68

Illegality, future separation of husband and wife 68

INCOME TAX.

Companies—Voluntary liquidation—Undistributed profits—Accounts not made up to time of liquidation—Liability for sur-tax—Finance Act, 1922 (*c.* 17), *s.* 21 *—Finance Act,* 1927 (*c.* 10), *s.* 31 [Austins of East Ham, Ltd. *v.* Inland Revenue Commissioners] 275

Deductions—Capital expenditure—Trade association—Expenditure for price maintenance—Expenditure to secure acquisition of business for its winding up—Expenditure to secure acquisition of business that it may become an active member of the association [Collins (Inspector of Taxes) *v.* Joseph Adamson & Co., Joseph Adamson & Co. *v.* Collins (Inspector of Taxes)] 236

PAGE

Double taxation — Relief — Shares in English company held by Indian company—Dividends of English company suffering tax—Relief to preference shareholder in Indian company [BARNES (INSPECTOR OF TAXES) *v.* HELY HUTCHINSON] 286

Exemptions—Charity—Charity established in United Kingdom—One trustee so resident [INLAND REVENUE COMMISSIONERS *v.* GULL] 290

Maintenance to be paid free of tax—Certificate given for deduction of tax—Maintenance payments allowed as deduction against income — Right of divorced woman to repayment [SPILSBURY (INSPECTOR OF TAXES) *v.* SPOFFORTH] 487

Sur-tax—Residuary life tenant—Sums credited to residuary life tenant during period of administration [CORBETT *v.* INLAND REVENUE COMMISSIONERS] .. 700

Unclaimed balances — Carried into partners' current accounts—Trade receipt —Subsequent payment — Deduction [MORLEY (INSPECTOR OF TAXES) *v.* TATTERSALL] 339

Incriminating matter, discovery, relevant to issues raised in defence 366

Indictment, preferring, discretion of judge in chambers 320

Indorsement, forged, extent of inquiry by bank 90

INDUSTRIAL SOCIETIES.

Trading society—Member's debts to society to be liquidated by reduction of capital—Winding up of society—Position of liquidator where rule ignored [LLOYD *v.* FRANCIS] 489

Injunction, interlocutory, costs of, final injunction abandoned 80

INNS AND INNKEEPERS.

Limitation of liability—Exhibition of copy of Act—Conspicuous part of hall or entrance—Innkeepers' Liability Act, 1863 (*c.* 41), *ss.* 1, 3 [SHACKLOCK *v.* ETHORPE, LTD.] 672

Instalments, purchase price payable by, disclosure by undischarged bankrupt 54

——, sale of goods, guarantee, county court in which action to be commenced 231

INSURANCE.

Motor car insurance—Purported assignment of policy by vendor of car—Policy handed to purchaser—Whether person injured by purchaser can recover from insurers [PETERS *v.* GENERAL ACCIDENT & LIFE ASSURANCE CORPN., LTD.] .. 628

——, *Use of vehicle in connection with business or profession — Profession stated in policy—Insured also carrying on other business—Physical characteristics of goods carried—Road Traffic Act*, 1934 (*c.* 50), *s.* 12 (*d*) [JONES *v.* WELSH INSURANCE CORPORATION, LTD.] 149

Interest, effect of legislation in a foreign jurisdiction 206

Intermediate examination, opportunity of, supply of faulty article 382

INTOXICATING LIQUORS.

Licensing—Publican's licence—Bias of justices—Order of removal by confirming authority—Justices also members of city council—Subject previously considered by council under planning scheme—Public statements showing hostile attitude [R. *v.* SHEFFIELD CONFIRMING AUTHORITY, *Ex parte* TRUSWELL'S BREWERY CO., LTD.] 114

——, ——, *Condition attached by justices—Restriction of sale to a limited class—Validity—Licensing (Consolidation) Act*, 1910 (*c.* 24), *s.* 14 (1) [R. *v.* SUSSEX CONFIRMING AUTHORITY, *Ex parte* TAMPLIN & SONS' BREWERY (BRIGHTON), LTD.] 106

PAGE

Invented word, geographical name .. 23

Invention of employee, right of master to assignment 693

Jones v. *Westcomb*, rule in, lapse by death 664

Judgment in default of defence, estoppel 516

Justification, particulars of, when to be delivered 293

LAND DRAINAGE.

Bank—Some distance from main river—Protection against flood—Whether bank within Land Drainage Act, 1930—*Liability to repair—Land Drainage Act,* 1930 (*c.* 44), *ss.* 1-7, 9, 11, 81 [NORTH LEVEL COMMISSIONERS *v.* RIVER WELLAND CATCHMENT BOARD] 684

LANDLORD AND TENANT.

Rent restriction — Decontrol — Controlled rooms in a dwelling-house—Occupation by a trespasser—Subsequent letting to the trespasser—Whether landlord has regained actual possession—Rent and Mortgage Interest Restrictions Act, 1923 (*c.* 32), *s.* 2 (1) [HOLDEN *v.* HOWARD] 483

Landlord and tenant, agricultural holding, disturbance, bad cultivation, calling in surveyor 510

Lapse, meaning of in home-made will .. 664

Lead poisoning, due to water supply .. 675

Legislation, retrospective, validity, gold clause contract 516

Libel, particulars of justification, before discovery 293

Licence, "C," conveyance of excavated soil 101

——, cinema, proposed to be built .. 263

——, condition, restriction to travellers by company's coaches 106

——, transfer of 656

Life interest with power to deal with capital 1

Life tenant of residue, sums paid during administration liability to tax 700

Limitation, of action, damages for conversion, copyright 405

——, of liability, innkeeper, place for notice 672

——, ——, package 304

Loading, stowage, certificate of surveyor 304

——, stowage on hatch covers 39

London County Council, provision of housing accommodation within metropolitan borough 678

LUNATICS.

Care of—Institution—Absence on leave—Past history of patient—Inquiry by officers and committee—Negligence [HOLGATE AND ANOTHER *v.* LANCASHIRE MENTAL HOSPITALS BOARD, GILL AND ROBERTSON] 19

Defective — Detention — Order — Continuance order—Whether imperative that it should be made on date of expiry of previous order—Mental Deficiency Act, 1913 (*c.* 28), *s.* 11 [R. *v.* MORDEY, THE BOARD OF CONTROL AND EAST HAM CORPORATION, *Ex p.* WINTERFLOOD] .. 163

Machinery, dangerous, in mines, fencing 219

Maintenance, free of tax, repayment of tax to wife 487

Manufacturer, faulty article, liability to ultimate user, intermediate examination 382

Marks, sum payable in, assessment of amount now payable 133

Married woman, income subject to restraint, release of restraint in favour of creditors 635

Masonic temple, gift for 501

MASTER AND SERVANT.

Invention of servant—Right of master to benefit of—Implied condition—Express condition for assignment—Express agreement for invention to be exclusive property of master—Validity [TRIPLEX SAFETY GLASS CO., LTD. *v.* SCORAH] 693

PAGE

Maxima, in county courts scales, no power to exceed 478

MEDICINE.

Surgeon—Operation—Liability for acts of resident hospital staff—Tube left in body—Res ipsa loquitur—"Personal attention" [MORRIS *v.* WINSBURY-WHITE] 494
Memorial hall, war memorial, charitable purpose 545
Mental patient, absence on leave, inquiry 19
Milk marketing scheme, prices for milk according to use to which milk put, sterilised cream 669
Mill gearing, absolute duty to fence .. 58

MINES.

Coal mine—Machinery—Exposed and dangerous parts—Not kept securely fenced—Coal Mines Act, 1911 (*c.* 20), *ss.* 55, 102 [CAREY *v.* OCEAN COAL CO., LTD., CAREY *v.* RICHARDS, CAREY *v.* REES] 219
——, *Minimum wage—Rate of minimum wage applicable in particular case—Whether within jurisdiction of the court or the trade tribunal* [MCCARTHY *v.* PENRIKYBER NAVIGATION COLLIERY CO., LTD.] 597
Minimum wage, collier, jurisdiction of trade tribunal 597
Misconduct, solicitor, application to Law Society, right of applicant to be heard 451
Misfeasance, directors, relief from liability 43

MONEY.

Annuity payable under will and family arrangement—Sum expressed in marks—Assessment of amount to be paid after alteration of German currency—Whether exercise of discretion of court [KORNATZKI *v.* OPPENHEIMER] 133
Covenant to pay on a gold basis—Redemption of debenture—Payment of interest—Construction of bond—Surrounding circumstances [BRITISH & FRENCH TRUST CORPORATION *v.* NEW BRUNSWICK RAILWAY CO.] 516
Motor car, sale of car, policy handed over, lapse of insurance 628
——, used in other than business stated in policy, avoidance of insurance .. 149
Motor goods vehicle, C licence 101
——, transfer of licence 656

Naturalisation, declarations on, evidence as to domicil 618

NEGLIGENCE.

Breach of statutory duty—Loading ship—Loading at intermediate deck—Stowage on hatch covers—Duty to strengthen hatch covering—Docks Regulations, 1934 (*S.R. & O.*, 1934, *No.* 279), *regs.* 36, 38 [HANLON AND OTHERS *v.* PORT OF LIVERPOOL STEVEDORING CO., LTD.] .. 39
Damages—Assessment—Shortened expectation of life—Injuries resulting in death to girl of 8 years of age [TRUBYFIELD *v.* GREAT WESTERN RAILWAY CO.] 614
Latent defect—Breakage of ring causing death of workman—Liability of manufacturer—Opportunity for intermediate examination—Damages—Persons entitled to damages for loss of expectation of life [DRANSFIELD *v.* BRITISH INSULATED CABLES, LTD.] 382
Negligence, water supply, lid of valve-box left open 639
Notice, innkeeper, limitation of liability, place for exhibiting 672
——, to parties, of appointment of umpire 154

Open space, planning scheme, assessment of compensation 189
Operation, surgical, refusal to undergo, when reasonable, request of employer .. 345
——, tube left in body, liability of surgeon 494
Option to purchase land, duration, three years certain 324

Panel patient, dentist, medical practitioner not on dentists' register 184
Particulars, justification, when to be delivered 293
Partnership, medical, signing medical certificate 242

PATENT.

Infringement—Validity—Prior publication—Problem before earlier inventor—Amendment—Original claim framed in good faith and with reasonable skill and knowledge—Damages—Back damages—Patents and Designs Acts, 1907-1932, *s.* 23 [MOLINS *v.* INDUSTRIAL MACHINERY CO., LTD.] 295
Practice—Application to the comptroller to revoke—Matters which may not be considered by the comptroller—Want of utility, prior user, want of subject-matter—Application to amend specification—Restrictions on amendments under sect. 11*—Patents and Designs Acts,* 1907-1932, *ss.* 11, 21, 25, 26 [*Re* JOHNSON & JOHNSON (GREAT BRITAIN), LTD.'S PATENT] 561
Patent, taken out by employee, right of employer to assignment 693
Payment into court, costs of interlocutory injunction 80
——, purchase money, compulsory purcase of school property bought by the aid of Treasury grant 197
Pension based on salary, currency in which payable 570
Personal injuries, shortened expectation of life, assessment of damages 614
Policy, annuity in consideration of lump sum payment, stamp duty 159
——, handed over on sale of car, lapse of insurance 628
Possession, actual, trespasser in possession 483
Power of attorney, execution under, necessity to abstract 447

POWERS.

Will—No appointment of executors—Life interest with full power to deal with capital as if donee's own—Gift over—General power of appointment—Power to appoint by will [*Re* LAWRY'S ESTATE, ANDREW *v.* COAD] 1

PRACTICE.

Application for security for costs—Nonpayment of costs in court below—Insufficiency of affidavit—R.S.C., Ord. 58, *r.* 15 [HILLS *v.* LONDON PASSENGER TRANSPORT BOARD] 230
——, *Plaintiff resident abroad—Subject-matter of action property within the jurisdiction of the court—R.S.C., Ord* 65, *r.* 6 [KEVORKIAN *v.* BURNEY (NO. 2)] .. 468
Application for transcript of shorthand notes—Notes of discussion in judge's private room [VERNAZZA *v.* BARBURRIZA & CO., LTD.] 364
Costs—Action for nuisance—Claim for injunction and damages—Motion for interlocutory injunction—Claim for damages satisfied by payment in—Claim for injunction abandoned—Liability for costs of motion and application for costs at hearing of action [WILTSHIRE BACON CO., LTD. *v.* ASSOCIATED CINEMA PROPERTIES, LTD.] 80
Extension of time for appealing—Interlocutory order—Leave to appeal—Plaintiff in America—R.S.C., Ord. 58, *r.* 15*—R.S.C., Ord.* 64, *r.* 7 [KEVORKIAN *v.* BURNEY] 97
Particulars—Libel action—Fair comment—Rolled-up plea—Particulars of facts relied on [TUDOR-HART *v.* BRITISH UNION FOR THE ABOLITION OF VIVISECTION] 475

PAGE

——, ——, *Justification—Particulars of justification—Whether before or after discovery—R.S.C., Ord.* 19, *rr.* 4, 27 [GOLDSCHMIDT *v.* CONSTABLE & CO.] .. 293

Predecessor, settlement only possible by joining two parties 171

PRIVY COUNCIL.

Canada—Stock Exchange—Purchase on margin—Client never in default—Account closed—Broker selling shares on receipt and purchasing on account being closed—Measure of damages [SOLLOWAY *v.* MCLAUGHLIN, MCLAUGHLIN *v.* SOLLOWAY] 328

Cyprus — Money — Currency — Contract with Turkish corporation—Pension based on salary—Whether payable on a gold basis [OTTOMAN BANK OF NICOSIA *v.* CHAKARIAN] 570

India—Highways—Vesting in local authority—Extent of vesting—Erection of portico resting on public street—Right to authorise—Right of owner of soil to sue in trespass—United Provinces Municipalities Act (India), 1916, *s.* 116—*Public Health Act*, 1875 (*c.* 55), *s.* 149 [HIS HIGHNESS MAHARAJA MAN SINGH OF SEWAI JAIPUR *v.* ARJUN LAL AND OTHERS] 5

New South Wales—Agency—Care and diligence of agent—Sole agency—Extent of undertaking to "push" sales—Duty in premises under agent's control—Supply by agent of defective stoppers [B. DAVIS, LTD. *v.* TOOTH & CO., LTD.] .. 118

New Zealand—Conflict of laws—Interest on debentures issued in New Zealand by borough council and secured on a rate—Whether interest thereon reduced by effect of Financial Emergency Act, 1931 (*No.* 3961 *of Victoria*), *s.* 19 (1) —*Distinction between obligation and performance of the obligation* [MOUNT ALBERT BOROUGH COUNCIL *v.* AUSTRALASIAN TEMPERANCE AND GENERAL MUTUAL LIFE ASSURANCE SOCIETY, LTD.] 206

West Africa—Voluntary conveyance—Medical practitioner and patient—Setting aside at instance of patient—Presumption of undue influence [WILLIAMS *v.* JOHNSON (since deceased), now represented by WILLIAMS AND ANOTHER] .. 34

PUBLIC HEALTH.

Housing—Provision of housing accommodation—Administrative County of London—Powers of London County Council—Housing Act, 1925 (*c.* 14), *s.* 80—*Housing Act*, 1935 (*c.* 40), *s.* 74—*Housing Act*, 1936 (*c.* 51), *s.* 103 [*Re* COUNTY OF LONDON (STOKE NEWINGTON) HOUSING ORDER, 1936, APPLICATION OF STOCKER] 678

Public policy, future separation of husband and wife 68

Purity of water supply, duty of board .. 675

Quia timet action, unsuccessful attempts to bribe employees 279

Receiver, appointed by court, liability for rent 432

——, under debenture deed, proof of appointment, onus of proof 374

Recital, estoppel by, recital of existing charge 396

Rejection, buyer's right, offer for Saturday's steamer 371

"Relations," meaning in will since passing of Administration of Estates Act .. 342

Remitted action, costs, before remission, on county court scale 610

Rent, liability for, receiver appointed by court 432

Requisition, by foreign government, whether writ can be issued in England 313

Res ipsa loquitur, application to surgical operation 494

PAGE

Residue, life tenant of, liability to tax .. 700

——, when executors take beneficially 464

REVENUE.

Stamp duty—Policy securing half-yearly payments upon payment of a lump sum—Sale of annuity or security for annuity—Stamp Act, 1891 (*c.* 39), *s.* 87 (2), *Sched.* [COMMERCIAL UNION ASSURANCE COMPANY, LTD. *v.* INLAND REVENUE COMMISSIONERS] 159

——, *Transfer of shares—Acquisition of not less than 90 per cent. of issued share capital—Part of 90 per cent. of issued share capital previously acquired for cash —Finance Act*, 1927 (*c.* 10), *s.* 55 [LEVER BROTHERS. LTD. *v.* INLAND REVENUE COMMISSIONERS] 227

——, *Voluntary conveyance — Necessity for adjudication* [CONYBEAR *v.* BRITISH BRIQUETTES, LTD.] 191

Ribbon development, compensation, injurious affection 142

Road, haulage of goods, transfer of licence, when inquiry held 656

——, supported by wall, altering level of road 588

Russell v. *Russell*, rule in, admission by wife 423

SALE OF GOODS.

Passing of property—Construction—Agreement to collect scrap-metal from some artillery ranges—Metal collected in a dump but not removed from the ranges—Ownership of metal in dump—"Collected therefrom" [GALE *v.* NEW] 645

Rejection—Offer for "Saturday's steamer" —Acceptance for "next steamer"—Condition that goods to be shipped on that steamer—Delay due to failure to load by shipowner [WILSON *v.* WRIGHT] 371

Sale of goods, instalment payments, guarantee, county court in which action commenced 231

SALE OF LAND.

House in course of erection—Certain fittings and plastering still to be done—Whether complete house or in course of erection [PERRY *v.* SHARON DEVELOPMENT CO., LTD.] 390

Option to purchase — Duration — Three years certain—Provision for notice—Whether determinable at expiration of three years [*Re* DOWNES & LOBBS' CONTRACT, DOWNES *v.* LOBBS] 324

Purchaser undischarged bankrupt—Purchase price payable by instalments—Whether disclosure necessary [DE CHOISY *v.* HYNES] 54

Title—Abstract—Deed over 30 years old—Execution under power of attorney—Abstract of power of attorney [*Re* COPELIN'S CONTRACT] 447

Scale items, maxima not to be exceeded 478

Scrap metal, agreement to collect, passing of property 645

Secret process, right of master to assignment of employee's invention 693

Secured loan, guarantee, necessity for existence of charge 396

Security for costs, costs in court below unpaid 230

——, statue subject of action within jurisdiction 468

Sentence, taking pending charges into consideration, charges beyond jurisdiction of court 327

Separation, future, of husband and wife, illegality 68, 471

SETTLEMENTS.

Tenant for life and remainderman—Apportionment—Securities sold after death of tenant for life—Dividends partly accrued due during lifetime of tenant for life—Payment of apportioned part out of purchase money to the estate of tenant for life [*Re* WINTERSTOKE'S WILL TRUSTS, GUNN *v.* RICHARDSON] 63

PAGE

Shares, transfer of, acquisition of 90 per cent. of shares in another company, stamp 227

——, ——, voluntary transfer, necessity for adjudication 191

Sheep, carried in car, avoidance of insurance 149

SHIPPING.

Bill of lading—Loading—Certificate of surveyor — Limitation of liability — "Package"—Compliance with Harter Act [STUDEBAKER DISTRIBUTORS, LTD. *v.* CHARLTON STEAM SHIPPING CO., LTD.] 304

Foreign-owned vessel — Requisition by foreign government—Vessel outside territorial jurisdiction—Claim for possession by owners—Motion to set aside writ—Impleading a foreign government [THE CRISTINA] 313

Shipping, loading on hatch covers 39

Shortened expectation of life, damages .. 614

Shorthand notes, discussion in judge's private room, transcript of 364

Society, industrial, set-off of debt against capital paid up 489

SOLICITORS.

Application to Disciplinary Committee of the Law Society—Allegations of professional impropriety—Applicant not present before committee—Order by committee dismissing application — Appeal to the Divisional Court—Appellant not represented by counsel—Refusal by Divisional Court to hear the appeal—Solicitors Act, 1932 (*c.* 37), *s.* 8 [*Re* TWO SOLICITORS] 451

Stamp duty, annuity in consideration of lump sum payment 159

——, transfer of shares, acquisition of 90 per cent. of shares in transferor company 227

——, ——, voluntary transfer, necessity for adjudication 191

Statutory powers, interference with private rights, injunction or compensation 348

Sterilised cream, price of milk for 669

Stock exchange, fraudulent transactions on margin, measure of damages .. 328

Stop-light, whether hand-signal also necessary 249

Stoppers, defective, supply of for whisky bottles 118

Stowage, certificate of surveyor, Harter Act 304

STREET TRAFFIC.

Goods vehicles—Utility car—Whether subject to speed limit—Road Traffic Act, 1934 (*c.* 50), *s.* 2, *Sched. I* [HUBBARD *v.* MESSENGER] 48

Motor vehicles—Stop-light automatically operated by brakes—Hand-signals—Road Traffic Act, 1930 (*c.* 43), *ss.* 30 (1) (*h*), 45 — *S.R. & O.*, 1935, *No.* 897 [CROSTON *v.* VAUGHAN] 249

Road haulage of goods by motor vehicles—Carriers' licence—Application to transfer licence—Whether licensing authority can hold an inquiry—Road and Rail Traffic Act, 1933 (*c.* 53), *s.* 11 [*Re* AN APPLICATION BY WOODWARD, WOODWARD *v.* NORTH WESTERN TRAFFIC AREA LICENSING AUTHORITY] 656

——, *Private carrier's licence — "C" licence—Whether vehicle used for carriage of goods for hire or reward—Road and Rail Traffic Act*, 1933 (*c.* 53), *ss.* 1 (5) (*a*), 9 (1) [SPITTLE *v.* THAMES GRIT & AGGREGATES, LTD.[.. 101

Succession duty, joint or sole predecessor, settlement only possible by joining two parties 171

Sur-tax, undistributed profits of company, liquidation 275

Tattersalls, reporting to, whether extortion 559

Tenant for life, apportionment of dividends, securities sold after death of tenant for life 63

THEATRES AND PLACES OF ENTERTAINMENT.

Cinemas—Cinematograph licences—"Premises specified in the licence"—Powers of justices—Whether provisional licence can be granted in respect of premises to be built—Cinematograph Act, 1909 (*c.* 30), *ss.* 2 (1), 5 [R. *v.* BARNSTAPLE JUSTICES, *Ex parte* CARDER] 263

Time for appealing, extension of 97

Title to hire-purchase goods, implied condition, when title must be shown .. 263

TORTS.

Contribution between joint tortfeasors—Jurisdiction to apportion blame without special application—"Proceedings"—Jurisdiction of Court of Appeal to vary proportions fixed by judge—Law Reform (Married Women and Tortfeasors) Act, 1935 (*c.* 30), *s.* 6 (2) [CROSTON *v.* VAUGHAN] 249

TOWN AND COUNTRY PLANNING.

Development restricted by statute—Compensation for injury to estate or interest—Whether development proposals practicable at date of claim for compensation—Proposals abandoned or amended—Restriction of Ribbon Development Act, 1935 (*c.* 47), *s.* 9 (1) (*a*) [MELKSHAM URBAN DISTRICT COUNCIL *v.* WILTSHIRE COUNTY COUNCIL] 142

Land scheduled as open space—Claim for compensation—Basis of computation—Whether loss of building profits also recoverable—Acquisition of Land (Assessment of Compensation) Act, 1919 (*c.* 57), *s.* 2 (2)—*Town and Country Planning Act*, 1932 (*c.* 48), *s.* 10 (6) [COLLINS *v.* FELTHAM URBAN DISTRICT COUNCIL] 189

Town planning, licensing, bias of justices 114

Trade association, expenditure to reduce competition, deduction from profits .. 236

TRADE MARKS.

"Livron"—Geographical name—Invented word—Discretion to refuse registration—Mark calculated to deceive—Trade Marks Act, 1905-1919, *ss.* 9, 11, 35 [*Re* THE APPLICATION OF THE SOCIETE DES USINES CHIMIQUES RHONE-POULENC, *Re* TRADE MARK, "LIVRON," OF BOOTS PURE DRUG CO., LTD.] 23

Transfer, shares, acquisition of 90 per cent. of shares in another company, stamp 227

——, ——, stamping of voluntary transfer, necessity for adjudication 191

Treasury grant, repayment of, compulsory purchase of school property .. 197

Trust receipts, goods in warehouse, equitable charge or declaration of trust 651

Umpire, appointment of, notice to parties 154

Unclaimed balances, liability to tax .. 339

Undischarged bankrupt, sale of land and business, purchase price payable by instalments 54

Undistributed profits, liquidation of company, liability of shareholders for surtax 275

Utility car, whether goods or passenger vehicle 48

Valve-box, lid left open, liability of undertaker 639

Variation, contract required to be in writing, whether writing necessary 552

Vehicle used for carriage of goods for hire or reward, C licence 101

Wall, supporting road, highway authority's liability to repair 588

War memorial, whether a charitable purpose 545

WATER SUPPLY.

Domestic purposes—Purity of supply—Pure while in mains—Water dissolving lead—Statutory duty—Common law duty to warn persons supplied [Barnes *v.* Irwell Valley Water Board] .. 675

Local authority—Exercise of statutory powers—Interference with private rights—Whether injunction available or only a right to compensation—Grant of water rights as now enjoyed—Extent of grant [Beauchamp *v.* Frome Rural District Council] 348

Upkeep of fittings—Valve-box in roadway—Cover-plate left open by person unknown—No danger when cover closed—Liability of undertakers for injury to pedestrian [Wells *v.* Metropolitan Water Board] 639

Wife, repayment of tax to, maintenance free of tax 487

WILL.

Construction — Conditions — Validity — Devisee to make estate his home—Not to allow a named person to set foot on property [*Re* Talbot-Ponsonby's Estate, Talbot-Ponsonby *v.* Talbot-Ponsonby] 309

——, *Gift to " all my relations "—Rule of convenience—Variation of rule due to the enactment of Administration of Estates Act*, 1925 (*c.* 23), *s.* 46 [*Re* Bridgen, Chaytor *v.* Edwin] 342

——, *Gift to association—Gift applicable as members shall direct—Fund to build masonic temple—Validity* [*Re* Turkington, Owen *v.* Benson] 501

Construction—Necessary implication—Ultimate gift over upon lapse by death—Gift failing by reason of donee never having had any children—Rule in Jones v. *Westcomb* [*Re* Fox's Estate, Dawes *v.* Druitt, Phœnix Assurance Co., Ltd. *v.* Fox] 664

——, *" Residue to be disposed of as my executors think fit "—Executors hold on trust for persons entitled on a partial intestacy and do not take beneficially* [*Re* Carville, Shone *v.* Walthamstow Corporation] 464

Will, life interest with power to deal with capital, appointment by will 1

WORK AND LABOUR.

National health insurance—Dentistry—Medical practitioner not on dentists' register—Right to give dental treatment to member of approved society—Dentists Act, 1921 (*c.* 21), *s.* 1 (3) (*a*)—*Dental Benefit Regulations*, 1930 (*S.R. & O.*, 1930, *No.*1060), *regs.* 2, 21 (1) [Bynoe *v.* General Federation of Trade Unions Approved Society (110)] .. 184

WORKMEN'S COMPENSATION.

Average weekly earnings—Shortage of work—Voluntary spread-over agreement—Senior man—Custom for junior workmen to be withdrawn first—Rate of remuneration—Workmen's Compensation Act, 1925 (*c.* 84), *s.* 10 (1) [Morgan *v.* Tareni Colliery Co., Ltd.] 505

Course of employment—Acts in emergency——No great danger—Stoppage of employer's work [Dermody *v.* Higgs & Hill, Ltd.] 379

——, *Commencement—Accident on way to work — Emergency work — Workmen's Compensation Act*, 1925 (*c.* 84), *s.* 1 (1) [Blee *v.* London & North Eastern Railway Co.] 270

Incapacity—Whether due to accident or to refusal to undergo surgical operation—Absence of request by employers—Unreasonable conduct [Purvis *v.* Goole Steam Shipping (London, Midland & Scottish Railway)] 345

Industrial Disease—Incomplete recovery from disease contracted more than 12 *months before date of disablement—Liability of employers within the* 12 *months—Employment to the nature of which the disease was due—Workmen's Compensation Act*, 1925 (*c.* 84), *s.* 43 [Eaton *v.* George Wimpey & Co., Ltd.] 583

Medical reference — Previous medical referee no longer available—" Exceptional difficulty "—Medical certificate signed in firm name of a partnership of doctors—" Report " and " certificate "—Workmen's Compensation Act, 1925 (*c.* 84), *ss.* 12 (3), 19 (2) [Cartwright *v.* Lilleshall Co., Ltd.] 242

Proceedings against third party—Alternative remedies—Workman in receipt of full wages—Receipts signed for compensation but no compensation actually paid—Whether action barred [Lind *v.* Johnson] 201

——, *Indemnity—Loan of workman—" Employer "—" Person other than the employer "—Workmen's Compensation Act*, 1925 (*c.* 84), *ss.* 5, 30 [Doxford & Sons, Ltd. *v.* Furness Shipbuilding Co., Ltd.] 334

Workmen's compensation, alternative remedies, payment of full wages and receipt signed for compensation .. 201

Writ *in rem*, foreign government impleaded, ship always outside territorial waters of requisitioning government .. 313

STATUTES, ETC., REFERRED TO

	PAGE
Succession Duty Act, 1853 (*c.* 51), *s.* 2	171
School Grants Act, 1855 (*c.* 131)	197
Innkeepers' Liability Act, 1863 (*c.* 41), *ss.* 1, 3	672
Public Health Act, 1875 (*c.* 55), *s.* 149	5
Stamp Act, 1891 (*c.* 39), *s.* 87 (2), Sched.	159
Sale of Goods Act, 1893 (*c.* 71), *s.* 4	552
Factory and Workshop Act, 1901 (*c.* 22), *s.* 10 (1) (*c*)	58
Trade Marks Act, 1905-1919, *ss.* 9, 11, 35	23
Criminal Appeal Act, 1907 (*c.* 23), *s.* 4 (1)	360
Patents and Designs Acts, 1907-1932, *ss.* 11, 21, 25, 26	561
——, 1907-1932, *s.* 23	295
——, *s.* 52	635
Cinematograph Act, 1909 (*c.* 30), *ss.* 2 (1), 5	263
Licensing (Consolidation) Act, 1910 (*c.* 24), *s.* 14 (1)	106
Coal Mines Act, 1911 (*c.* 20), *ss.* 55, 102	219
Copyright Act, 1911 (*c.* 46), *s.* 10	405
Mental Deficiency Act, 1913 (*c.* 28), *s.* 11	163
Bankruptcy Act, 1914 (*c.* 59), *s.* 44	438
——, *s.* 155	54
Larceny Act, 1916 (*c.* 50), *s.* 31	559
Acquisition of Land (Assessment of Compensation) Act, 1919 (*c.* 57), *s.* 2 (2)	189
Dentists Act, 1921 (*c.* 21), *s.* 1 (3) (*a*)	184
Finance Act, 1922 (*c.* 17), *s.* 21	275
Agricultural Holdings Act, 1923 (*c.* 9), *s.* 12 (6)	510
Rent and Mortgage Interest Restrictions Act, 1923 (*c.* 32), *s.* 2 (1)	483
Housing Act, 1925 (*c.* 14), s. 80	678
——, *s.* 43	583
Administration of Estates Act, 1925 (*c.* 23), *s.* 46	342
Workmen's Compensation Act, 1925 (*c.* 84), *s.* 1 (1)	270
——, *ss.* 5, 30	334
——, *s.* 10 (1)	505
——, *ss.* 12 (3), 19 (2)	242
Finance Act, 1927 (*c.* 10), *s.* 31	275
——, *s.* 55	227
Local Government Act, 1929 (*c.* 17), *s.* 29	588
Companies Act, 1929 (*c.* 23), *s.* 372	43
Road Traffic Act, 1930 (*c.* 43), *ss.* 30 (1) (*h*), 45	249
Land Drainage Act, 1930 (*c.* 44), *ss.* 1-7, 9, 11, 81	684
Solicitors Act, 1932 (*c.* 37), *s.* 8	451
Town and Country Planning Act, 1932 (*c.* 48), *s.* 10 (6)	189
Administration of Justice (Miscellaneous Provisions) Act, 1933 (*c.* 36), *s.* 2	320
Road and Rail Traffic Act, 1933 (*c.* 53), *ss.* 1 (5) (*a*), 9 (1)	101
——, *s.* 11	656
Arbitration Act, 1934 (*c.* 14), *s.* 4 (1)	154
Road Traffic Act, 1934 (*c.* 50), *s.* 2, Sched. 1	48
——, *s.* 12 (*d*)	149
County Courts Act, 1934 (*c.* 53), *ss.* 47, 73	610
Law Reform (Married Women and Tortfeasors) Act, 1935 (*c.* 30), *s.* 6 (2)	249
Housing Act, 1935 (*c.* 40), *s.* 74	678
Restriction of Ribbon Development Act, 1935 (*c.* 47), *s.* 9 (1) (*a*)	142
Housing Act, 1936 (*c.* 51), *s.* 103	678
Birkenhead Improvement Act, 1884 (*c.* lvi), *s.* 21, Sched. II	75
United Provinces Municipalities Act (India), 1916, *s.* 116	5
Financial Emergency Act, 1931 (No. 3961 of Victoria), *s.* 19 (1)	206
Federal Gold Clauses Obligations Act (Canada), 1937 (*c.* 37)	516
Gold Clauses Act (New Brunswick), 1937 (*c.* 45)	516
R.S.C., Ord. 19, rr. 4, 27	293
——, Ord. 58, r. 15	97, 230
——, Ord. 64, r. 7	97
——, Ord. 65, r. 6	468
C.C.R., 1936, Ord. 2, r. 1	231
——, Ord. 47	478
Dental Benefit Regulations, 1930 (S.R. & O., 1930, No. 1060), regs. 2, 21 (1)	184
Docks Regulations, 1934 (S.R. & O., 1934, No. 279), regs. 36, 38	39
Motor Vehicles (Direction Indicator and Stop Light) Regulations, 1935 (S.R. & O., 1935, No. 897)	249

WORDS AND PHRASES

	PAGE
All my relations	342
Collected therefrom	645
Conspicuous part of hall or entrance	672
Livron	23
Package	304
Personal attention	494
Physical characteristics of goods carried	149
Premises specified in the licence	263
Proceedings	249
Residue to be disposed of as my executors think fit	464
Saturday's steamer	371
Tinned cream	669

THE
ALL ENGLAND
LAW REPORTS
ANNOTATED

Re LAWRY'S ESTATE, ANDREW *v.* COAD.

[CHANCERY DIVISION (Bennett, J.), **July 29, 30, 1937.**]

Powers—Will—No appointment of executors—Life interest with full power to deal with capital as if donee's own—Gift over—General power of appointment—Power to appoint by will.

By his will a testator gave his residuary estate to his two sisters, C. L. and A. J. L., equally "for their respective lives with full power to deal therewith as if it were their own and on the death of either of them or in the event of either or both of them predeceasing me then I give and bequeath her or their share or shares to W. B. A. absolutely." A. J. L. died during the testator's lifetime. C. L. survived the testator having made a will which, if it were proved, and if C. L. had a general power of appointment by will over the property given to her by the testator's will, would operate as an execution of her power:—

HELD: upon the construction of the will and in the events which had happened, C. L. was entitled to a life interest together with a general power of appointment exercisable either *inter vivos* or by will over one moiety of the capital of the testator's residuary estate.

Re Thomson's Estate, Herring v. *Barrow* (1) *distinguished.*

[EDITORIAL NOTE. There was little question but what C. L. in this case had a power of appointment over the moiety given to her by the will; but it was strongly argued that it was a power only exercisable during her life and not by her will, reliance being placed upon *Re Thomson's Estate, Herring* v. *Barrow* (1). That case was, however, distinguished, since there was in the will there in question a gift over of "anything remaining" at the beneficiary's death, which negatived a power of appointment by will. The absence of any such words here (though there was a gift over in general terms) was held to show an intention that C. L. should have an unrestricted general power of appointment.

AS TO LIFE INTEREST WITH SUPER-ADDED POWER OF DISPOSITION, see HALSBURY, Hailsham Edn., Vol. 25, pp. 515-519, paras. 934-942; and FOR CASES, see DIGEST, Vol. 37, pp. 389-396, No. 34-87.]

Cases referred to:

(1) *Re Thomson's Estate, Herring* v. *Barrow* (1879), 13 Ch. D. 144; (1880), 14 Ch. D. 263; 37 Digest 396, *85*; 49 L.J. Ch. 622; 43 L.T. 35.

(2) *Re Shuker's Estate, Bromley* v. *Reed*, [1937] 3 All E.R. 25; Digest Supp.

(3) *Re Pounder, Williams* v. *Pounder* (1886), 56 L.J. Ch. 113 ; 37 Digest 399, *117* ; 56 L.T. 104.

(4) *Re Sanford, Sanford* v. *Sanford,* [1901] 1 Ch. 939 ; 37 Digest 397, *92* ; 70 L.J. Ch. 591 ; 84 L.T. 456.

(5) *Re Ryder, Burton* v. *Kearsley,* [1914] 1 Ch. 865 ; 37 Digest 396, *87* ; 83 L.J. Ch. 653 ; 110 L.T. 970.

(6) *Re Richards, Uglow* v. *Richards,* [1902] 1 Ch. 76 ; 37 Digest 396, *86* ; 71 L.J. Ch. 66 ; 85 L.T. 452.

(7) *Pennock* v. *Pennock* (1871), L. R. 13 Eq. 144 ; 37 Digest 396, *84* ; 41 L.J. Ch. 141 ; 25 L.T. 691.

SUMMONS by William Bishop Andrew, the administrator with will annexed of the estate of William Daniel Lawry, asking for the determination of the question whether upon the true construction of the will and in the events which had happened the testator's sister Caroline Selina Lawry was entitled :

> (i) To a life interest in the moiety of the residuary estate of the testator without any power of appointment or disposition over the capital thereof, or (ii) To such life interest as aforesaid together with a general power of appointment exercisable *inter vivos* only over (*a*) one moiety of the capital of the said residuary estate or, (*b*) the whole of such capital, or (iii) To such life interest as aforesaid together with a general power of appointment exercisable either *inter vivos* or by will over (*a*) one moiety of the capital of the said residuary estate or (*b*) the whole of such capital, or (iv) To some other and what interest in right to or power over the said residuary estate or some and what part thereof.

The facts and the terms of the will are set out in the judgment.

D. Ll. Jenkins, for the plaintiff, the administrator with will annexed of the estate of the testator : The will gave no beneficial power to Caroline Lawry. It is a power to deal with the property as if it was her own ; that is merely an administrative power. It is a power to sell or to retain investments. It is not a power to make the property her own. If the will did give a beneficial power, it was a power exercisable only *inter vivos*. No executors or trustees were appointed by the will. Apart from the words " to deal with it as their own," there are none of the usual powers given. There are no words which import an intention that the sisters were to take a beneficial interest in the capital for themselves. The gift in remainder is clearly framed with the intention of giving the share of each sister, on her death, to the plaintiff. That is inconsistent with the view that the testator intended the sisters to have a beneficial power. The words of the will can be satisfied by construing them as giving an administrative power. The language of the will points to a power which shall endure only so long as the life interest endures.

[Counsel referred to *Re Shuker's Estate* (2), *Re Thomson's Estate, Herring* v. *Barrow* (1), *Re Pounder, Williams* v. *Pounder* (3), *Re Ryder, Burton* v. *Kearsley* (5), *Re Richards, Uglow* v. *Richards* (6).]

A. H. Droop, for the defendant, the executor named in the will of Caroline Lawry : Caroline Lawry had a life interest together with a general power of appointment exercisable either by deed or will over a moiety. There is no case in which it has been suggested that words of power were not beneficial words. It has never been held that words of power at the end of a life interest should be construed as a trust, without a statement that there is a trust. There is no authority for the proposition that where there is a life tenancy with words of power added, it can be construed as a trust power unless one can say it is a trust power. In the present case the will does not suggest a trust power, but a beneficial power. The words are not appropriate for giving an administrative power, but they are for giving a beneficial power, and there is nothing in the will to indicate a management power. There is nothing in the will in the present case to show that the power is limited to disposition *inter vivos*. There are no words which limit the generality of the power which it is submitted is a beneficial power. [Counsel referred to *Re Shuker's Estate* (2), *Re Sanford, Sanford* v. *Sanford* (4), *Re Thomson's Estate* (1), *Re Richards, Uglow* v. *Richards* (6), *Re Ryder, Burton* v. *Kearsley* (5), *Pennock* v. *Pennock* (7).]

BENNETT, J.: The late Mr. Lawry made his will on Feb. 22, 1927, in the following terms:

> I revoke all wills by me at any time heretofore made. I give and bequeath my freehold dwelling-house and premises known as "Lombardy House" aforesaid in which I now reside and the furniture therein unto my two sisters Caroline Lawry and Alice Jane Lawry during their lives and on the death of the survivor of them or in the event of their predeceasing me I give the same unto my nephew William Bishop Andrew absolutely. All the remainder of my property both real and personal which I may be possessed of at the time of my death I give and bequeath unto and equally between my said two sisters for their respective lives with full power to deal therewith as if it were their own and on the death of either of them or in the event of either or both of them predeceasing me then I give and bequeath her or their share or shares to my said nephew William Bishop Andrew absolutely.

The testator died on Jan. 23, 1937. His sister Alice predeceased him, dying in 1936. His sister Caroline survived him by 8 days; she died on Jan. 31, 1937, having made a will which, if it be proved, and if she has a general power of appointment over the property given to her by her brother's will, will operate as the execution of her power. The plaintiff is the administrator, with the will annexed, of the will of the testator William Daniel Lawry. The defendant is the executor named in the will of the testator's sister, Caroline Lawry. The question is, what was the power which Miss Caroline Lawry had conferred upon her by her brother's will respecting the remainder of the testator's property. On behalf of the plaintiff, the first point taken was that the power which the testator gave by his will to his sister Caroline was merely an administrative power. I see no reason for limiting the power in that way. There is nothing in the language that leads to the conclusion that it should be so determined. The power is to deal with the property, in which Caroline was given a life interest, as if it were her own. A person who has that power, in the absence of some words of restriction being implied, can do with the property anything which he pleases, including the doing of that which makes it his own. The second point taken by Mr. Jenkins is that, assuming that Miss Caroline Lawry had a power of appointment, the power is limited to an appointment, which is to be operative during the lifetime of the donee of the power, and does not extend to the power of disposition of the property by will.

The foundation of the argument was the decision in *Re Thomson's Estate* (1). The circumstances which gave rise to the question were these. The testator gave devised and bequeathed

> all my messuages, lands, tenements, and hereditaments, and all my household furniture, ready money, goods and chattels, and all other parts of my real and personal estate and effects whatsoever and wheresoever, unto my dear wife Margaret for the term of her natural life, to be disposed of as she may think proper for her own use and benefit according to the nature and quality thereof, subject only to the payment of my just debts and funeral expenses, and the charges of proving and registering this my will. Secondly, in the event of her decease, should there be anything remaining of the said property or any part thereof, I give, devise, and bequeath the said part or parts thereof to my sister Elizabeth Barrow and to the children of my brother Robert Thomson in manner following . . . .

Upon that will it was held by Hall, V.-C., and by the Court of Appeal that the widow of the testator took a life interest with an absolute power of disposition exercisable by her during her lifetime, but not by testamentary instrument. That decision is, I think, the authority upon which Mr. Jenkins, for the plaintiff, has founded his argument that the power in this case should be held to be one which excludes the power of appointment by testamentary instrument. I think, when one comes to look at the language of Hall, V.-C., that the ground of his decision was the word "remaining." He says, at p. 147 :

> The words "secondly, in the event of her decease should there be anything remaining of the said property or any part thereof," draw a line at the death of the lady, so that what is "remaining" at the moment of her death becomes at that time the subject of the gift over and belongs to the residuary legatees : "remaining" is consistent with there being a power of disposition other than a testamentary power.

Now, there is no such word in this will, and the power, which in my view is a beneficial power and not a mere administrative power, is one which gives the donee a power to deal with the property, in which the testator has given her a life interest, as if it were her own. What can a person do with property if it be her own ? Can she or can she not dispose of it by testamentary disposition ? The answer must be : Yes, she can. Ought it to be cut down because the testator has here given an interest in remainder to some one else ? I think the answer is that which Mr. Droop gave, that any vested interest is liable to be defeated by the exercise of a power if the power be given. The interest in remainder must be read as if it were subject to the power. Therefore, in my judgment, this donee, Miss Caroline Lawry, did have given to her by the will of the testator, not only a power of disposing of the property during her life, but also a testamentary power of appointment.

The answer to the question in the summons will be that, upon the true construction of the will and in the events which have happened, Miss Caroline Lawry was entitled to a life interest together with a power of appointment exercisable either *inter vivos* or by will over one moiety.

Costs, as between solicitor and client, out of the estate. The defendant will be appointed to represent the estate.

Solicitors : *Church, Adams, Tatham & Co.*, agents for *G. J. Lee-Barber*, Torquay (for the plaintiff) ; *Hedley Norris & Co.*, agents for *Peter & Gainsford*, Looe (for the defendant).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

HIS HIGHNESS MAHARAJA MAN SINGH OF SEWAI JAIPUR *v.* ARJUN LAL AND OTHERS.

[PRIVY COUNCIL (Sir Lancelot Sanderson, Sir Shadi Lal, Sir George Rankin), **June 28, July 26, 1937.**]

Privy Council—India—Highways—Vesting in local authority—Extent of vesting—Erection of portico resting on public street—Right to authorise—Right of owner of soil to sue in trespass.—United Provinces Municipalities Act (*India*), 1916, *s.* 116—*Public Health Act*, 1875 (*c.* 55), *s.* 149.

In the United Provinces all public streets are vested in the municipality by statute. The Municipal Board sanctioned the erection of a portico resting upon pillars standing on the footpath. The plaintiff, who was, subject to the statutory rights of the municipality, the owner of the soil of the highway, claimed a mandatory injunction ordering its demolition and damages, basing his action upon a trespass to his property in the land :—

HELD : although the municipality under the statute took only a restricted interest in the street sufficient to safeguard its use as a highway, they had power to sanction the erection of the portico, and the plaintiff had no right of action in trespass. The court expressed no opinion as to the plaintiff's right to complain of the portico as a nuisance in a properly constituted action.

[EDITORIAL NOTE. It is well settled that the " vesting " of a street in a local authority is a limited vesting and gives the authority no further property in the street than is necessary for the maintenance and user of the street as a street. The previous cases have generally been actions instituted by the local authority to preserve its own and the public rights ; but the present appeal tests how far the owner of the soil has lost his right to bring an action of trespass in respect of erections authorised by the local authority. The action is purely one of trespass and leaves open any question of the possibility of recovery in an action for nuisance, where the plaintiff shows damage peculiar to himself or the action is brought by the proper public officer at the relation of the complainant.

AS TO EFFECT OF STATUTORY VESTING, see HALSBURY, Hailsham Edn., Vol. 16, pp. 249-251, paras. 300, 301 ; and FOR CASES, see DIGEST, Vol. 26, pp. 329-331, Nos. 616-631.]

Cases referred to :

(1) *Municipal Council of Sydney* v. *Young*, [1898] A.C. 457 ; 26 Digest 329, *616i.*

(2) *Finchley Electric Light Company* v. *Finchley Urban Council*, [1903] 1 Ch. 437 ; 26 Digest 329, *608 ;* 72 L. J. Ch. 297 ; 88 L. T. 215.

APPEAL from a judgment of the High Court at Allahabad (THOM and KISCH, JJ.), dated Dec. 21, 1933, reversing a judgment of the second additional subordinate judge at Allahabad, dated Nov. 14, 1932, and restoring the judgment of the Munsif dated June 19, 1931, whereby the suit was dismissed.

The facts of the case are set out in the judgment of their Lordships delivered by Sir George Rankin.

A. M. Dunne, K.C., and *J. M. Parikh* for the appellant.

J. E. Godfrey for the respondents. A

Sir George Rankin: The suit was brought on Dec. 2, 1930, against the Municipal Board of Allahabad (defendant No. 1) and four persons (defendants 2 to 5) who own and occupy a shop situated near to the junction of City Road and the road leading from the collector's B cutcherry to Colonelganj within the municipality of Allahabad. The appellant is the owner of revenue-free land measuring 0·35 acres in Mohalla Katra Jai Singh Sewai, and the shop in question, as also the street in front thereof, are within the limits of the appellant's land. His complaint is that defendants 2 to 5 have, with the sanction of the C Municipal Board, but without permission from him, erected a portico along the front of their premises and upon the margin or footpath (patri) of the street. The roof of the portico is a masonry structure supported by iron pillars which rest on the street, and the floor of the portico is raised (by stone slabs or concrete) about one foot above the level of the D street. The top of the portico is at the same level as the floor of the second storey of the shop building, i.e., the portico is only one storey high. The appellant by his suit claimed a mandatory injunction for the demolition of the portico together with damages and other relief. The Munsif dismissed the suit, but on first appeal the subordinate E judge, though he refused to award damages, granted the claims "for injunction and demolition."

The appellant, before the Board as in the Courts in India, has contended that in his character as proprietor of the land over which the street runs he is entitled to object to the erection of the portico. Not as a member F of the public complaining of the portico as an obstruction to traffic, or as the owner of a house or land adjacent complaining of it as a nuisance, but as the owner of the soil upon which defendants 2 to 5 have built a structure without his permission, he claims to be entitled to object to it. That the solum of the street was originally vested in him is plain, G and the authorities have even recognised a right in him to levy a tax on itinerant traders who squat on the footpath in this locality at certain times. But it is equally clear that his rights as proprietor have been modified, not merely by the circumstance that he has or must be deemed to have dedicated the land as a highway, but also by the fact that it H has become a public street within the meaning of the United Provinces Municipalities Act (II of 1916), s. 2 (19). Sects. 116, 209, and 210 of this Act are of importance for the decision of this appeal:

116. Subject to any special reservation made by the Local Government, all property of the nature hereinafter in this section specified and situated within the

> municipality shall vest in and belong to the board, and shall, with all other property which may become vested in the board, be under its direction, management, and control . . . (*g*) all public streets and the pavements, stones, and other materials thereof, and also all trees, erections, materials, implements and things existing on or appertaining to such streets.
>
> 209.—(1) Subject to any rules made by the Local Government prescribing the conditions for the sanction by a board of projections over streets or drains, a board may give written permission, where provision is made by a bye-law for the giving of such permission—(*a*) to the owners or occupiers of buildings in or on streets to erect or re-erect open verandahs, balconies, or rooms, to project over the street from any upper storey thereof, at such height from the surface of the street, and to such an extent beyond the line of the plinth or basement wall as are prescribed in such bye-laws, and (*b*) to the owner or occupier of any building or land to erect or re-erect any projection or structure so as to overhang, project into, or encroach on or over a drain in a street to such an extent, and in accordance with such conditions, as are in like manner prescribed.
>
> (2) In giving permission under subsect. (1) (*a*) a board may prescribe the extent to which, and the conditions under which, any roofs, eaves, weatherboards, shop boards and the like may be allowed to project over such streets.
>
> 210. Any person erecting or re-erecting any such projection or structure as is referred to in sect. 209 without the permission thereby required or in contravention of any permission given thereunder shall be liable on conviction to a fine which may extend to two hundred and fifty rupees.

The contention of the appellant is that the effect of sect. 116 is to give to the Municipal Board—not the full title to the solum of the street—but only a special property therein sufficient to enable the board to control it as a street; that this right is not inconsistent with and does not oust the right of the appellant as the owner of the land to object to the erection of a building thereon without his permission. The respondents on the other hand contend that the section is intended to make the Municipal Board owners of the surface of the street and of so much above and below as is necessary for the discharge of their duties and the exercise of their powers under the Act. Both sides appeal to the decisions of the Courts in England upon the effect of similar language in Acts of Parliament—in particular, the Public Health Act, 1875, s. 149. In *Municipal Council of Sydney* v. *Young* (1), a case arising under a provision that "all public ways in the city of Sydney now or hereafter formed shall be vested in the council," etc., it was held that upon a portion of the street being taken over and converted into a tramway the council had no claim for compensation. LORD MORRIS said, at p. 459:

> Now it has been settled by repeated authorities . . . that the vesting of a street or public way vests no property in the municipal authority beyond the surface of the street, and such portion as may be absolutely necessarily incidental to the repairing and proper management of the street, but that it does not vest the soil or the land in them as the owners. If that be so, the only claim that they could make would be for the surface of the street as being merely property vested in them *qua* street, and not as general property.

This passage puts forcibly the restricted sense to be attributed to the word "vest" in enactments such as sect. 116 of the United Provinces Act now in question. It is equally true, on the other hand, as COLLINS, M.R., stated in *Finchley Electric Light Company* v. *Finchley Urban Council* (2) at p. 440:

> It has been decided by a long series of cases that the word "vest" means that the local authority do actually become the owners of the street to this extent: they become the owners of so much of the air above and of the soil below as is necessary to the ordinary user of the street as a street, and of no more.

In the present case the dispute is not with reference to something sufficiently below or above the surface of the street to be beyond the range of its ordinary user as a street. The erection complained of undoubtedly required sanction from the Municipal Board under sect. 209 (1) (*b*), if only by reason of the fact that it encroached on or over a drain. Apart from any right of the appellant to complain of it as an obstruction or nuisance, A
or to complain that sanction was not duly granted, their Lordships have upon a full consideration of the Act to see whether it intends that structures affecting the surface and the space immediately above the surface are to be erected only by permission of the proprietor of the solum of the street as well as by leave of the Municipal Board. Their B
Lordships think not. They consider that it would put too narrow a meaning upon the words "shall vest in and belong to the board" if it were to be held that the Municipal Board was not competent of itself in the due course and exercise of its powers to authorise such an erection as is here complained of. To that extent the Municipal Board has C
property in the street: it is part of the purpose of sect. 116 that the board should not lack the ownership necessary to support an effective control of such matters, and that the general property of the original landowner in the solum of the street should be modified and abridged in that behalf. Without in any way holding that sect. 116 operates to con- D
vey title in the full and proper sense (*cf.* the observations of Romer, L.J., in the *Finchley* case (2), at pp. 443-4), their Lordships think it at least certain that the original owner of the soil cannot maintain trespass for an erection of the character now in question, and they do not think that he can otherwise complain of it as an infringement of his rights as owner. E
They express no opinion upon the question whether a permanent structure with pillars resting upon the highway is or is not an obstruction or is an inappreciable obstruction to the highway or is such as could be complained of by the Advocate-General or by others with his consent (sect. 91 C.P.C.) on behalf of the public or by a member of the public showing damage F
special to himself. No such case is raised by the appellant before the Board and their Lordships are not to be understood to countenance any suggestion that the vesting in the municipal authority of a street and the control over it can enable the authority by licensing other persons to interfere with the street, to protect those persons from the conse- G
quences of any nuisance to the public or danger to individuals which may be caused by such interference.

They will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors: *Hy. S. L. Polak & Co.* (for the appellant); *Douglas* H
Grant & Dold (for the respondents).

[*Reported by* T. A. Dillon, Esq., *Barrister-at-Law.*]

WOODS *v.* WOODS.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Langton, J.), **June 4, 9, 10, 25, 29, 30, July 1, 2, 6, 7, 28, 1937.**]

Divorce—Collusion—Constraint of petitioner—Money payment to secure signing of petition—Unreality of proceedings.

The respondent, a solicitor, was anxious to obtain a divorce from his wife. In 1934 the wife had, with the approval of the husband, agreed to purchase a house, and found herself in the greatest straits to find £115 19*s.* 3*d.* required to complete the purchase. On Nov. 30, 1934, the respondent wrote to his wife informing her of adultery at an hotel and suggesting action being taken thereon. On Jan. 28, 1935, the wife, who did not desire a divorce, instructed her solicitors to file a petition. On Feb. 4, the respondent gave his solicitors a sealed envelope for transmission to his wife. Although there was nothing to prevent such solicitors sending the envelope direct to the wife, it was in fact sent to the wife's solicitors with a request that they would hand it to her on her next attending at their office. On Feb. 6 the wife attended at her solicitors' office, signed the petition for divorce, and received the sealed envelope, which was found to contain a cheque signed by the respondent for £116. On Jan. 8 the wife's solicitors had written that upon all arrears due to her being paid to her account, the necessary steps "in the other matter" would be taken, and the clerk of those solicitors admitted that he deliberately withheld the envelope until the petition had been signed. The wife, the petitioner, attempted throughout the proceedings to conceal from the court the motives for her actions:—

HELD: (i) it could not be held upon the facts that the collusive bargain was obtained by duress, so that, there being in law no bargain at all, there was no collusion.

(ii) the facts disclosed that, as the petitioner did not desire a divorce, there was no real injury to her, and amounted to collusion and an abuse of the process of the court.

[**EDITORIAL NOTE.** It is suggested in this case that, as collusion is of the nature of a bargain between the parties, a bargain entered into under coercion, being in the ordinary way no bargain at all, cannot amount to collusion. For the purposes of collusion, however, it is necessary to consider the reality of the case put before the court, and, if the parties when before the court set up a case not in accordance with that reality, there is jurisdiction in the court to deal with it, if not as collusion, then as an abuse of the process of the court. Where, therefore, it appears that the petitioner has been induced to file the petition in consideration of a money payment or the discharge of debts, there is a *prima facie* case of collusion, though it is possible that it may not be fatal to the case if the petitioner makes full disclosure to the court and really desires to divorce the respondent.

AS TO COLLUSION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 677, 678, paras. 1000-1003; and FOR CASES, see DIGEST, Vol. 27, pp. 333-336, Nos. 3133-3160.]

Cases referred to:

(1) *W——, M. J.* v. *W——, H. R. W.*, [1936] P. 187; [1936] 2 All E.R. 1112; Digest Supp.; 105 L. J. P. 97; 155 L.T. 319.
(2) *Crewe* v. *Crewe* (1800), 3 Hag. Ecc. 123; 27 Digest 333, *3133*.
(3) *King* v. *King* (1915), 32 T.L.R. 78; 27 Digest 482, *5110*.

INTERVENTION by Ada Emily Martin, a spinster, as a member of the public showing cause why a decree *nisi* of dissolution of marriage should not be made absolute. The parties were married in London in 1915.

In her petition, dated Feb. 7, 1935, the wife alleged the adultery of her husband during days in Nov., 1934, at the Charing Cross Hotel, with a woman named Edith Matthews. The husband entered an appearance, but did not file an answer. There was no application for leave to enter an appearance by the woman named before the pronouncement of the decree *nisi* on June 27, 1935. On Feb. 22, 1936, Ada Emily Martin entered an appearance in the suit as a member of the public, intervening to show cause why the decree *nisi* should not be made absolute. She alleged that in fact she was the woman named in the petition, and that she had, in pursuance of an agreement with the respondent, in order to furnish evidence for a divorce, spent three nights with him at a hotel, but that no adultery had been committed. On June 26, 1936, an argument having been directed on the issues raised by the intervention, Bucknill, J., decided (1) that Ada Emily Martin was entitled to intervene as having still the character of " any person " within the Judicature Act, 1925, s. 183 (2). By her plea, the intervener alleged (i) that the decree *nisi* had been obtained contrary to the justice of the case, by reason of collusion and suppression of material facts, (ii) that she had not committed adultery with the respondent, and that a term of the arrangement between them was that no intercourse should take place, and (iii) that the respondent had made a payment to the petitioner in consideration of her taking divorce proceedings. The petitioner and the respondent denied the allegations.

R. F. Bayford, K.C., and *Walter Frampton* for the petitioner.

Noel Middleton, K.C., and *Clifford Mortimer* for the respondent.

Parnell Kerr for the intervener.

Langton, J.: This is an important and a most unsavoury case. I have delayed giving judgment in order to take time for reflection, and not because I had any doubt upon the major issues in the case, which are issues of fact. These issues are of no interest or importance save to the parties concerned. Nor do I attach any particular importance to the fact that this appears to be the first case in this court in which the intervener, who is the woman named in the divorce proceedings, is intervening after decree *nisi* in her capacity as a member of the public. It has been determined by Bucknill, J. (1) that she has a right to intervene in that capacity, and his decision has not been called in question. The public importance of this case lies in the fact that the respondent in the case is a solicitor, and, as such, an officer of the High Court of Justice, and that both he and a brother solicitor, whom he has engaged to represent him in these proceedings, have gone into the witness-box to acknowledge and defend their combined action in constraining the petitioner to file a petition for divorce in spite of the fact that the petitioner had not the slightest desire to bring such a petition, and was, at the inception of the suit, and still is, greatly averse to such a course. It is because of this aspect of the matter that I have delayed giving judgment. Mr. Woods and Mr. de Fonblanque are, I understand, solicitors of standing in their profession. They have both, I gather, been engaged professionally in this court on numerous occasions. I should regret it immeasurably if any unconsidered word of mine harmed them unjustly in the practice of their profession. I have accordingly felt that I ought to weigh carefully what should be said in public upon this matter. [His Lordship dealt with the question of adultery and found it proved.]

I can now pass to the far more simple question of collusion. Here it is really only necessary to marshal the facts in correct chronological order to raise an inescapable inference. It is admitted that Mr. Woods, the respondent, strongly desired divorce. It is admitted that he not only communicated this strong desire to Mrs. Woods but also, upon her refusal to divorce him, brought to bear upon Mrs. Woods all the pressure which he was capable of bringing to induce her to file a petition. It is true that Mr. Woods did not deal with his wife direct, but employed a fellow solicitor, Mr. de Fonblanque, to act on his behalf. It is also true that Mrs. Woods either herself sought, or was directed as part of the pressure, to seek independent legal advice at the hands of Messrs. Braikenridge & Edwards. In the autumn of 1934 Mrs. Woods embarked, with the knowledge and approval of her husband, upon the purchase of a house, and, at the end of the year, was in debt upon this transaction to the extent of £115 19*s.* 3*d.* She found herself in the greatest straits as to raising this money, which was due for the completion of the purchase. Her husband was admittedly fully aware of her precarious position, and Mr. de Fonblanque, his legal adviser, was equally well-informed. On Nov. 30, 1934, Mr. Woods wrote a letter to his wife, which does not vary from well-worn precedent, informing her of his adultery at the Charing Cross Hotel, and suggesting inquiry and action. On Jan. 8, 1935, Mrs. Woods made a clear statement to her husband, through her solicitors, of the amount of her indebtedness, and, at the same time, or a little later, complained bitterly of the fact that she had been driven to resort to the charity of her friends in order to raise the money necessary for completion.

On Jan. 28, Mrs. Woods, who desired nothing so little in the world as divorce, instructed her solicitors to file a petition against her husband.

On Feb. 4, Mr. Woods sent a sealed envelope to Mr. de Fonblanque, for transmission to Mrs. Woods. Although Mr. de Fonblanque was personally acquainted with Mrs. Woods, and could not have had the slightest difficulty in discovering her private address, if he did not already know it, and although he was acting as legal adviser to Mr. Woods, he passed on this sealed envelope to Messrs. Braikenridge & Edwards, with a request that it should be handed to Mrs. Woods on her next attending at their office. This in itself might strike an outside observer as somewhat strange conduct on the part of a responsible legal adviser, and Mr. de Fonblanque admitted that he had never thus passed on a sealed envelope before or since. It is, I hope, and I believe, unusual for a responsible legal adviser in divorce proceedings to pass on secret communications from his client to the other side.

But a truly remarkable chain of coincidences followed. Messrs. Braikenridge and Edwards were expecting Mrs. Woods to call at their office on Feb. 6 to sign her petition of divorce. They therefore retained the sealed envelope in their hands until she in fact called. Nor did they inquire or seek to speculate as to what the envelope might contain, although they were the lady's legal advisers, not only in the matter of divorce, but also in the matter of the purchase of her house. When she in fact called, the petition for divorce was immediately presented to her for signature. As soon as she had signed the paper, the sealed envelope was presented to her, and, by the most remarkable coincidence of the whole chain, it happened to contain a cheque, signed by her husband, Mr. Woods, for £116—or exactly 9*d.* more than the sum which she so sorely needed, and which she had been driven to raise by appealing to the kindness of her friends. One further fact and one further coincidence remain to be recorded. The respondent, Mr. Woods, and the woman named in the petition, whom we now know to be Miss Martin, were both served with the petition on Feb. 14, 1935. But, on Feb. 8, Mr. Woods wrote to Miss Martin a letter containing the following sentences :

> The petition is signed and filed *at last* and I expect you will be able to do your last little service to me towards the end of next week for which I am eternally indebted to you, dear Ida. Will give you good notice for a morning. It will only take two mins.

If, after hearing the bare recital of these facts, there is anyone in the world who could believe that this divorce suit was not plainly bought and sold by a process of offer and acceptance, they must be possessed of a credulity far surpassing my own.

In order, however, to escape from the overwhelming inference of collusion in this case, one would have to shut one's eyes to far more than these bare facts. In a letter of a most revealing character, of Jan. 8, 1935, Messrs. Braikenridge & Edwards make use of the following expression :

> She [Mrs. Woods] also instructs us to ask that all the arrears of other moneys due to her also be paid to her account, and, on this being done, she will at once instruct us to take the necessary steps in the other matter in which we are mutually concerned. Any further delay must therefore rest with your client, and we trust he will at once comply with the above request.

The only other matter in which the two firms were mutually concerned was the possibility of divorce proceedings between these same parties. Mr. Murrough, the managing clerk of Messrs. Braikenridge & Edwards, went into the witness-box at my request to explain the part which his firm had taken in these remarkable transactions. I am very happy to be able to record that, at long last, I found someone in this case whose evidence I saw no reason to distrust. But, when I asked Mr. Murrough, "Why did you wait to hand the envelope to Mrs. Woods until she had signed the petition?" there was a long and painful pause before Mr. Murrough could find words to reply. His long-delayed answer was, "I was anxious that the petitioner should sign the petition." When I pressed him a stage further, he said, "I deliberately withheld the envelope until she had signed the petition." Mrs. Woods, a pitiful figure of an elderly woman in distress, struggled feebly in the witness-box to support the imposture, but, in cross-examination by Mr. Parnell Kerr, she broke down completely. She was driven to admit, first, that she still loved her husband; secondly, that she brought the proceedings only to secure her future, and not because she wanted a divorce; and, finally, that she recognized that the house was part of her future security. Her parting sentence tore aside the last covering which masked this miserable sham. Speaking of the moment when she was handed the envelope in the office of Messrs. Braikenridge & Edwards, she said, "I was in hopes that I was going to get the balance of the house money." After this evidence, there could not be a vestige of doubt that this petition was prepared in collusion, and is barred by reason of collusion. Upon this issue, the intervener therefore succeeds.

Mr. Bayford, on behalf of Mrs. Woods, attempted at one stage to argue that, since pressure had been brought to bear upon his client, she was no longer a free agent, and that the proceedings were not, therefore, collusive. I did not gather from his final speech that he persevered with this contention. Quite apart from the answer which I shall have to consider presently, that, if the proceedings were, for this reason, not tainted by the sham of collusion, they might be even more decisively barred by the unreality of constraint, the contention is, on the facts of this case, completely unsound. The pressure exerted upon Mrs. Woods fell far short of anything amounting to duress. The unfortunate lady had been accustomed to a certain standard of comfort, which she was naturally anxious to maintain. Her husband played upon this weakness, wrongly and unfairly, as I see it, to constrain her to a collusive suit, into which she entered with her eyes open, and under legal advice, in order to secure the best bargain obtainable.

Such a set of circumstances differs *toto coelo* from the only case of which I have any knowledge—an unreported decision of my own—in which so overwhelming a degree of coercion was exercised upon an unfortunate wife that I felt able to hold that a bargain so obtained was no bargain at all. It is unnecessary to recite the circumstances here, since they are very unlikely ever to be repeated, but, to avoid future misunderstanding, it is proper to record that the lady petitioner in that case came herself into court to explain voluntarily every detail of her actions, and never attempted, as Mrs. Woods has done, both at the hearing of the petition and in these proceedings before me, to conceal from the court the motives for her actions.

It is now necessary to turn to the aspect of this case to which I referred

at the opening of my judgment as a matter of some public importance, namely, the open avowal in the witness-box, by two experienced solicitors, that they had combined to bring pressure to bear on Mrs. Woods to launch her divorce petition, and the astonishing defence put forward by one of them, Mr. de Fonblanque, that such things are done, and, as I gathered from his method of expression, quite commonly done, in the A
city of London. Put briefly, the plain, and, to a large extent, agreed, facts upon this aspect of the matter, are that Mr. Woods, the respondent, committed adultery in or about the year 1930 or 1931, and this adultery his wife was willing to condone, and has condoned. In the following year, Mr. Woods left his wife, but continued to make provision for her B
upon a scale which I have no reason to suppose was ungenerous. In Mar., 1934, upon his own sworn evidence, he commenced an illicit and adulterous association with Miss Ada Emily Martin. In the course of the years 1933 and 1934, Mr. Woods conceived a regard for a lady named Miss Amy Corliss, living in the north of England. It is fair to state that C
Mr. Woods claimed that he did not at first form any definite project of marrying Miss Corliss. Nevertheless, very soon after his friendship with Miss Corliss commenced, he formed, upon his own admission, the project of procuring a divorce from his wife. It is clear, again upon his own evidence, that he never at any time had the slightest desire to D
marry, or the remotest intention of marrying, Miss Martin.

At this juncture in his affairs, he put his interests in the hands of a fellow solicitor, Mr. de Fonblanque, with the avowed intention, known to both of them, of forcing his wife's hand, by financial pressure, to induce her to take divorce proceedings against him. Mr. Woods, I E
regret to say, has shown himself in these proceedings to be an unscrupulous and far from candid person, and, whether he chooses to admit it or not, I am perfectly satisfied that his object in thus constraining his wife to bring these proceedings was to enable him to gratify his personal desire to marry Miss Corliss. By a series of manœuvres, which F
I have already examined in sufficient detail, Mr. Woods, with the assistance of Mr. de Fonblanque, succeeded in imposing his will upon his reluctant wife, and, on Feb. 6, 1935, Mrs. Woods signed the petition for divorce, which is before me, at her own solicitors' office, and, at the same interview, and within the same five minutes, received a cheque for £116, G
signed by her husband. Upon these facts, the point of importance which emerges is whether, quite apart from the actual issues in this case, such conduct as this can be regarded by this court with equanimity.

Speaking in the witness-box on oath, and obviously with complete composure, Mr. de Fonblanque, on being questioned by me as to the H
professional morality of thus constraining an unwilling woman to file a petition for divorce to secure the husband's ends, shrugged his shoulders, and observed "it is done." It is probably always unwise to decide as a matter of law an issue which it is not necessary to decide for the purpose of the case in hand. It would be additionally unwise to do so

here when the point was raised by the court, and was anything but fully argued at the Bar—but, viewed only from the standpoint of professional conduct and morality, the matter seems to me to be altogether too important to be ignored. Upon this aspect of the matter, at least, I have no kind of doubt at all, and, lest an evil of this character should continue to persist, it is necessary that I should declare my view.

It has caused me very great apprehension to learn, first, that people are being constrained, and have been constrained in this way; secondly, that there are at least two solicitors in the city of London who are prepared to take a hand in such proceedings; and, thirdly, that they are prepared to defend them by the contention that this court is powerless to reject such a suit upon these admitted facts, but must submit, reluctantly but tamely, to be the instrument of the respondent's misplaced ingenuity.

As to the legal aspect, I will say only that, as at present advised, I do not believe that this is, or ever has been, the English law. The courts of justice of this country stand wide open to remedy wrongs. They exist to stultify evils, not to multiply them. Where there is a real injury, and an obvious remedy lies, I conceive it to be my duty to apply that remedy as swiftly and as effectively as possible. Where there is a real injury, but the remedy is not immediately apparent, I am ready and willing to listen to the extremes of legal ingenuity to discover whether a remedy cannot be provided. But I do not believe that it is any part of an English judge's duty to listen to an artificial suit, founded upon a manufactured wrong, which has no reality other than its shadowy existence, as an excuse to invoke the jurisdiction of the court. A suit of that character, as it stands revealed in this court to-day, is no more and no less than a coldly calculated step in a far from creditable manœuvre to take advantage of a weaker opponent. Courts of justice are not intended to serve as avenues of gain, nor have they any place as a portion of any field of manœuvre. It would require much argument to persuade me that a suit of this kind, so induced and procured, is not an abuse of the process of the court.

It is surely fundamental that every English court has the right to examine the *bona fides* of the suit before it, and to protect itself from the abuse of its process by a false, a maintained, or an unreal action. In the old case of *Crewe* v. *Crewe* (2), Sir William Scott, afterwards Lord Stowell, in dealing with collusion, uses the following language, at p. 130:

> Collusion, as applied to this subject, is an agreement between the parties for one to commit, or appear to commit, a fact of adultery, in order that the other may obtain a remedy at law as for a real injury. Real injury there is none, where there is a common agreement between the parties to effect their object by fraud in a court of justice.

This passage demonstrates clearly that the evil of collusion lies precisely in this, that the injury is no longer real. It would be strange indeed if the court were permitted, and, indeed, directed, by statute to deal with collusion, and to deny to a petitioner redress where it exists, because of the unreality of the injury alleged, and should at the same time remain powerless to deal with a far greater evil containing the same defect of unreality. It would seem to me, on the contrary, that, so far from being in any way so fettered, the right of the court to deal with such an abuse is *a fortiori* to its statutory right to deal with collusion. To put the matter in another way, the right to deal with collusion is merely a special instance of unreality with which the court is specially empowered by the statute to deal, but the statute does not pretend to take, and indeed could not, without the clearest and most express disabling words, take from the court its broad and universal powers.

In any event, whether I am right or wrong in this my present view of the law, I wish to state, in the most emphatic terms, that, if this kind of constraint is being practised, if, in Mr. de Fonblanque's words, "it is done," or if it has been done in the past, it is not to be done in the future. It is not easy to imagine how suits of this kind can be procured without some form of collusion, but, even if human ingenuity is sufficiently great to enable persons to exercise pressure, as these solicitors choose to phrase it, which falls short of collusion, a way will have to be found to defeat this kind of ingenuity. It is not to serve ends such as this that officers of the court are clothed with powers and authority, and, in my judgment, any solicitor, whether client in person or acting for a client, who thus constrains, or attempts to constrain, an unwilling spouse, who is suffering from no sense of wrong, to put forward a petition which she has no desire to prefer, is false to his trust, and offends against the moral code which governs his profession. Finally, I have to face the hardest part of this unpleasant task, namely, to discover the least harsh language in which the conduct of the individual solicitors, engaged either professionally or in person in this case, can be properly qualified.

It would be a lasting misfortune if the solicitors who practise in this court should gain the impression that the judges who preside here are insensible to the very great difficulties with which their branch of the legal profession is daily confronted. It requires but a small modicum of knowledge of human nature and the world to imagine the almost total lack of scruple with which many individuals approach the subject of their own divorce. Solicitors are not paid to supply, and do not claim to provide, moral enlightenment. I trust that I shall not, by this judgment, be taken or mistaken as suggesting that it is part of a solicitor's duty to express virtuous indignation either at his client's moral delinquencies or at the reckless course which lay clients are inclined to propose, and ready to carry out, in order to overcome the obstacles of the law.

Surely, however, it is not placing the standard of professional morality at any unattainable height to demand of officers of the High Court of Justice that they shall point out to the clients who consult them, the pitfalls in their path, and guide them away from, and not towards, practices which the law condemns. I cannot feel that I am putting upon the shoulders of solicitors an unreasonable burden, or one that the vast majority of a great profession would not willingly undertake, in saying that it is the duty of a solicitor not only to warn his client against either collusion or the even worse practice of constraint, if this practice in fact exists, but also to take the further step of making it completely clear to his client that if the client, in spite of his warning, persists in adopting this course of conduct, he cannot continue to be responsible for his affairs.

Turning now to the individual persons or firms concerned in this case, I do not find it necessary to speak with any great harshness of the part played in these proceedings by Messrs. Braikenridge & Edwards. I am satisfied that they closed their eyes firmly and deliberately to the collusive character of the suit into which their client was being manœuvred. It is difficult to conceive how any lawyers of spirit and energy could have thought that the whole of their duty lay in such a spineless submission to the dictation of their opponents. Against this, however, it would be possible to argue in their favour that they may well have over-estimated the quality of the opposition, and may have felt more handicapped than I know by the financial vulnerability and lack of resolution of their lay client. I have no serious stricture to make upon their professional morality, and will, I think, have done my duty if I say that I do not admire their conduct of Mrs. Woods' affairs.

Of Mr. de Fonblanque, it is unfortunately necessary to speak more severely. He is a solicitor of more than fifteen years standing. I am satisfied that he planned with his client, Mr. Woods, every step taken by the latter in manœuvring Mrs. Woods into this glaringly collusive suit. His defence for his action, in helping Mr. Woods to put pressure upon Mrs. Woods, and thus inducing her to sell to Mr. Woods his freedom for the smallest possible price, is the feeble subterfuge, "it is done." If professional morality is to rise no higher than this, everyone may be permitted to ape the conduct of the lowest. Every bad practice which may creep in is to be sanctified by custom, and the standard becomes immediately that of the weakest vessel. In my judgment, in a matter of this kind, such an excuse is worse than no excuse at all. I cannot say less of Mr. de Fonblanque than that I think he has fallen in this matter, not only below the highest standard of professional morality which obtains in his profession, but also below any level which I will accept as the standard which ought to prevail.

Lastly, as to Mr. Woods, there is so much in his conduct in this case which requires investigation that I find it necessary to send the papers to the Law Society. Having determined upon this course, it is not only possible for me to omit, but also fitting that I should refrain from, further comment upon his actions. In order, however, that he may be apprised of my reasons for so doing, I wish to make it clear that the collusion which I have found that he initiated, and the manner in which he has used his professional skill to impose his will upon his wife, are not the only, perhaps not the gravest, grounds of complaint against him. I have found against him, in addition, after hearing both sides, and in spite of the great distrust which I have felt concerning the evidence of Miss Martin, that he, and not Miss Martin, initiated the false address of 9, Pembroke Place, which he sent on to the petitioner, and that he sent on a name for Miss Martin which he knew to be false, though he may not personally have invented it. It is a fact, too, that he sent on to the petitioner a description of himself as an author, which was intentionally misleading in view of the fact that he is, and has been, a practising solicitor since the year 1905, and is an author only in the sense that he has written more than one novel. It will be for others to decide what was the object of these deceptions, and whether they were designed or were likely to embarrass or render nugatory the inquiries of the King's Proctor.

In conclusion, there is a further matter, which has come to my notice in the course of the case, which I am putting before the Law Society. In the year 1915, Mr. Woods acted as solicitor in the divorce suit of his present wife. In this suit of *King* v. *King* (3), Mrs. Woods was the petitioner, and Mr. Woods, in his professional capacity, appears to have sworn an affidavit to support an application to hasten decree absolute. There is, accordingly, no doubt that, not only his firm, but also Mr. Woods personally, was acting in this matter. At that time, if I have understood the evidence of Mr. Woods correctly, Mr. Woods was the father of an illegitimate child by his wife. There is, however, no record upon the file of the court to show that the discretion of the court was sought on behalf of Mrs. Woods. I desire to make it entirely clear that I have not investigated this concluding matter at all. I have not only not allowed it to cloud or colour my judgment of the matter before me, I also deliberately refrained from asking Mr. Woods any question concerning it, since it did not appear to me to have any relevance to the issues which I had to try. At the present moment, it is a matter of suspicion only, and, if Mr. Woods is able to explain the facts, and dispel the suspicion that has been aroused, no one will be better pleased than myself.

The result of this intervention will be that the intervention succeeds, and the decree *nisi* granted to Mrs. Woods must be rescinded.

Decree nisi rescinded.

Solicitors: *Braikenridge & Edwards* (for the petitioner); *J. B. de Fonblanque* (for the respondent); *Piper, Smith & Piper* (for the intervener).

[*Reported by* J. F. Compton Miller, Esq., *Barrister-at-Law.*]

HOLGATE AND ANOTHER *v.* LANCASHIRE MENTAL HOSPITALS BOARD, GILL AND ROBERTSON.

[LIVERPOOL SUMMER ASSIZES (Lewis, J., and a Special Jury), **June 9, 10, 1937.**]

Lunatics—Care of—Institution—Absence on leave—Past history of patient—Inquiry by officers and committee—Negligence.

L., a defective, had been convicted many times for various forms of assault, some of a serious character, and was finally sentenced to be detained during His Majesty's pleasure. After some time in a criminal lunatic institution he was transferred to the Calderstone Institution in Lancashire. His brother made an application for him to be let out on licence, stating that he would take a holiday and so be at home to look after him. This application was refused because L. had not been in the institution for a year. A later application was granted for a fortnight's absence, and no inquiry was then made as to whether the brother's former undertaking was renewed, and, in fact, the brother was neither seen nor questioned by anyone. At the end of the fortnight the licence was extended for another fortnight without further inquiry, and then for another month. The licence was signed by the deputy superintendent. During the period of the extended licence L. visited the plaintiff's house when the female plaintiff was there alone and savagely assaulted her.

The jury were directed that they should not find an officer negligent if he had merely committed an error of judgment; but should only do so if they found that he had failed to exercise that care and control necessary having regard to the character and past history of the patient. The jury found all three defendants, the hospital board, the superintendent and the deputy superintendent, negligent.

[EDITORIAL NOTE. This case has been made the subject of a special circular by the Board of Control. While it is of great interest to those having the care of defectives and insane persons with criminal tendencies, it does not decide any point of law and is only included here on account of the attention that has been drawn to it by the circular, and the fact that there is no reported decision on the duties of those in charge of lunatics when granting such licences.

AS TO ABSENCE ON LEAVE, see HALSBURY, Hailsham Edn., Vol. 21, pp. 433, 434, para. 754; and FOR CASES, see DIGEST, Vol. 33, pp. 269, 270.]

ACTION tried with a special jury for negligence in granting a licence to a lunatic to be absent for a month from the institution. The three defendants were, respectively, a statutory authority, the superintendent and the acting superintendent of the Calderstone Institution. The plaintiffs claimed damages for personal injury received at the hand of one John Lawson, a lunatic, through and by reason of breach of statutory duty and/or negligence of the defendants in and about the licensing of one, Lawson, to be absent from the Calderstone Institution.

Lawson had very early in life shown criminal tendencies, and, after convictions for wilful damage, indecent assault, housebreaking and theft, was sent to a reformatory school. He was then tried and acquitted for attempted rape. Within two months he was charged with robbery with violence and two cases of indecent assault. On Feb. 14, 1927, he was ordered to be detained during His Majesty's pleasure and was sent to Retford where the more dangerous classes of lunatics are detained.

The authorities there, as he gave no trouble, decided that the restrictions could be relaxed, and he was sent to Calderstone. An application was made for him to go out on licence to the house of a brother who with his wife and son worked in a mill while his daughter kept house. The visitor reported that the application was a proper one provided the brother took a week's holiday and would be at home to look after the lunatic. The first time this application was made it was refused, but upon a renewed application a licence was granted for a fortnight, to be extended to a month if his conduct was satisfactory. The leave was subsequently so extended, but the licence was never signed by the superintendent, but by Dr. Robinson, the deputy superintendent. The committee had been assured that the brother would properly supervise the lunatic, but the brother was not seen nor questioned by the committee when the application was finally granted, and the extension of the licence and a further extension for another month were granted without inquiry as to this. Before Lawson's extended leave elapsed he visited, on June 22, 1936, the house of the plaintiffs where the female plaintiff was alone. She gave him food and had begun to mend a garment at his request, when he struck her on the head and hand with a piece of wood, causing severe injury. Lawson was subsequently tried before Finlay, J., at the Lancaster Michaelmas Assizes, 1936, and ordered to be detained during His Majesty's pleasure. He was stated to have the mental calibre of a boy of nine years, and to be a moral imbecile with a criminal record. Dr. Gill, the second defendant, gave evidence at the trial.

In the present case the liability of a principal for the act of his agent was not disputed. The question was whether the two doctors had acted reasonably in the circumstances, more particularly as to obtaining information about Lawson and about the facilities for supervision before granting the licence, and as to actual supervision during the period of the licence.

Sir Patrick Hastings, K.C., and *J. C. Jolly* for the plaintiffs.

G. J. Lynskey, K.C., and *Ralph Etherton* for the defendants.

Lynskey, K.C.: Under the Mental Deficiency Act, 1913, even if the acting superintendent acted without jurisdiction, he could not be liable unless he acted in bad faith or without reasonable care. The defendants could have made an error of judgment without being guilty of negligence.

Lewis, J. [summing up to the jury]: In this case, as you have heard, the plaintiffs, Mr. and Mrs. Holgate, are suing the three defendants, the Lancashire Mental Hospitals Board, Dr. F. A. Gill and Dr. G. S. Robertson. The latter was the acting superintendent at the time of the occurrence and has since become the superintendent of the Calderstone Institution. The plaintiffs' case is that the three defendants have been guilty of negligence whereby the female plaintiff has suffered terrible injury and the male plaintiff has incurred special damage. You must be satisfied that the defendants, or one or other of them, are guilty of negligence before you award damages. It has been agreed that Dr. Gill and Dr. Robertson are agents. That means their negligence renders their principals, that is the Board, also guilty of negligence.

You have been told, quite properly, that it is very easy to be wise after the event. I do not suppose any of the defendants are happy about what happened. You must not judge necessarily by what happened. Nor must you say there is negligence if you think the defendants were only guilty of what has been termed an error of judgment. You should not find any person guilty of negligence who is really only guilty of an error of judgment. Bear in mind that these two defendants are experienced men in regard to mental hospitals. Dr. Gill has a forty years' service in them—remember that is the sort of person you are dealing with and do not let your natural sympathy with the female plaintiff warp your judgment. You must be satisfied that these three defendants have, or one or other of them has, been negligent. [His Lordship shortly stated the facts of the attack upon the female plaintiff and went on to consider Lawson's early record.] At the end of the year application was made for the man to go out for a holiday, i.e., on licence, to the house of a brother who worked in a mill. His wife and son did likewise, and the daughter kept house. A visitor from the institution reported, and you may very well think that the visitor was saying this, though not in express terms : This is a proper place for the mental defective, provided his brother will take a week's holiday at the same time as the defective is there and will look after him. It is a matter for you ; read the report. This application was refused on the ground that the authorities did not like to give a holiday within the first year of residence. The application was renewed by the brother in June, and the application resulted in this man, described by Dr. Gill as a "member of the most dangerous class" of persons who have trouble with their brains, being let out for a month.

Dr. Robertson, who was not the superintendent, and who, under the Act of Parliament, would appear not to be the proper person, signed a document to say he had received the necessary consents of two members of the committee. At the end of the fortnight an application was made for another fortnight by the brother, who reported Lawson's conduct as good. Dr. Robertson granted it and did not ask the committee's consent. He explained that there was no committee ; it meets only once a month. The committee had discussed a month's leave for Lawson, he said, divided into fortnights, and had really, therefore, granted a month. But, members of the jury, leave the validity or otherwise of the licence out of your minds ; at all events it was granted. At all events the committee only knew from Dr. Robertson that the man had behaved properly during the fortnight he was out. That committee thereupon let him out again for a month, before the end of which he had committed this attack.

That is the story. Do you or do you not think the doctors exercised reasonable care ? Dr. Gill is ill and has not been cross-examined. He never signed the document, he said he was busy elsewhere ; it is a matter for you whether that, inspecting buildings or something of that sort, was more important than seeing about letting out dangerous lunatics. Before Finlay, J., at Lancaster Assizes, Dr. Gill was sworn and said, *inter alia*, "This man is a defective, a mental defective, and comes under the category of a moral defective . . . on whom punishment has no effect . . . he is subject to impulses, unfortunately taking the form of assaults on the person." The judge asked whether he should have been out ; and the doctor replied that he was not safe to be out ; he had made attacks and it might happen again. Dr. Gill explained this yesterday by saying that he was relying on the attack having taken place. Later he said : "He was not out with my approval," inferring that he himself would not have let Lawson out at all. Yesterday, also on oath, Dr. Gill said, "I agreed to his having gone out."

If you think Dr. Gill realised at the time that Lawson was a very dangerous mental defective, you may think there was a very grave dereliction of duty amounting to negligence. Or was it merely an error of judgment on the part of an experienced doctor, Dr. Gill, thinking there was proper supervision ? You may think the first committee considered supervision ; the brother said he would be at home. You may ask should the committee, the second, have taken the word of the brother without further inquiry ; they did not see the brother. The leave granted was only a fortnight, then it was extended for another. There is no evidence of any inquiry being made when the licence was granted, certainly there was none when it was extended. Do you think that these doctors and the committee acted with reasonable care on the knowledge before them ? The two members of the committee who extended the licence had no information before them at all. You may think they should have made some sort of inquiry, for example, was he a harmless or a dangerous lunatic ? who had been looking after him ? what was the supervision ? The heading of the list they signed certified they had satisfied themselves as to the supervision and care of the lunatics ; the only inquiry they made was as to how he behaved during the fortnight. But put yourselves in the position of a member of the committee. They are not experts but ladies and gentlemen (doing a voluntary work). The acting superintendent told them this man behaved for a fortnight and asked for an extension. Is it exercising reasonable care to accept his experienced word ? They must know it is a place where are kept mental defectives ; you may think they should ask more if they are doing their duty. You may think failure to do that is not exercising reasonable care.

That is the allegation. The management is slack, the board does not know what happens, the committee take no interest and just do as they are told. Dr. Gill agrees to a dangerous lunatic going out ; and Dr. Robertson, who has said much the same about this man's character, whatever assurance he had for the first fortnight, as regards granting another fortnight said: "It is a dreadful thing to have done without making further inquiry." Bearing in mind the care and control of mental defectives which these people must exercise, Lawson's character, and the control (there was only a girl in the house), if you think the defendants did fail to exercise reasonable care, then find for the plaintiffs. But only so, and not out of sympathy for the plaintiff. [His Lordship dealt with the question of damages.]

The following question was left to the jury:

> Apart from the validity of the licences, were any of the defendants guilty of negligence; if so, which of them; and damages to the male and female plaintiff respectively?

Answer: Yes, all three; damages: £500 plus £208 special damage to the male plaintiff; £3,500 to the female plaintiff.

Solicitors: *Barker & Midgley* (for the plaintiffs); *Sir George Etherton*, Clerk to the Lancashire County Council (for the defendants).

[*Reported by* M. D. CHORLTON, *Barrister-at-Law.*]

Re THE APPLICATION OF THE SOCIÉTÉ DES USINES CHIMIQUES RHÔNE-POULENC. *Re* TRADE MARK, "LIVRON", OF BOOTS PURE DRUG CO., LTD.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Romer and MacKinnon, L.JJ.), **July 13, 14, 15, 1937.**]

Trade Marks—"Livron"—Geographical name—Invented word—Discretion to refuse registration—Mark calculated to deceive—Trade Marks Act, 1905-1919, *ss.* 9, 11, 35.

The appellants were the registered owners of the trade mark "Livron." They had in fact made this word up from the words "liver" and "iron." There is, however, and was at the date of registration, a town in France called Livron. It was a town of some 4,000 inhabitants where the respondents had a factory and carried on a business similar to that of the appellants:—

HELD: (i) the evidence was such that the Registrar ought to have refused registration because the mark was calculated to deceive.

(ii) the mark was not adapted to distinguish the goods of the proprietor.

(iii) per SIR WILFRID GREENE, M.R., and MACKINNON, L.J., the word "livron" was a geographical word and could not, therefore, be an invented word.

Per ROMER, L.J.: A word with no signification whatever to the ordinary Englishman cannot be a geographical word, and the fact that such a word is in fact a geographical name does not prevent it from being an invented word.

Decision of CROSSMAN, J. ([1937] 1 All E.R. 145), *affirmed.*

[**EDITORIAL NOTE.** By the decision in this case a word which is shown to be a geographical name cannot now be an invented word, subject only, as MACKINNON, L.J., remarked, to the doctrine of *de minimis.* The name of a field or of an unclimbable peak in the Himalayas might, the Lord Justice suggested, still be an invented word. ROMER, L.J., dissented from this view, and thought that a geographical word must be a word having a geographical significance to the ordinary

Englishman. This would reduce very considerably the number of words excluded upon this principle from being invented words, but would seem to introduce a rather difficult criterion of fact to be applied in such cases.

As to Geographical Names as Trade Marks, see HALSBURY, 1st Edn., Vol. 27, Trade Marks, p. 691, para. 1257; and for Cases, see DIGEST, Vol. 43, pp. 146, 147, Nos. 72-78.]

Cases referred to: A

(1) *Re Salt* (*Sir Titus*), *Sons & Co.'s Application*, [1894] 3 Ch. 166; 11 R.P.C. 517; 43 Digest 146, *74*; 63 L.J. Ch. 756; 71 L.T. 386.

(2) *Eastman Photographic Materials Co.* v. *Comptroller-General of Patents, Designs and Trade Marks*, [1898] A.C. 571; 15 R.P.C. 476; 43 Digest 140, *32*; 67 L.J. Ch. 628; 79 L.T. 195.

(3) *Philippart* v. *William Whiteley, Ltd.*, *Re Philippart's Trade Mark* "*Diabolo*," B [1908] 2 Ch. 274; 25 R.P.C. 565; 43 Digest 141, *36*; 77 L.J. Ch. 650; 99 L.T. 291.

(4) *Re Magnolia Metal Co.'s Trade Marks*, [1897] 2 Ch. 371; 14 R.P.C. 621; 43 Digest 213, *583*; 66 L.J. Ch. 598; 76 L.T. 672.

Appeal from a decision of Crossman, J., dated Dec. 4, 1936, and C reported in [1937] 1 All E.R. 145. The facts of the case are fully set out in that report and in the judgment of Sir Wilfrid Greene, M.R.

Kenneth R. Swan, K.C., and *H. J. W. Bliss* for the appellants.

Robert Burrell, K.C., and *Kenneth R. H. Johnston* for the respondents.

D

Sir Wilfrid Greene, M.R.: This is an appeal by the proprietors of a registered trade mark from the judgment of Crossman, J., who held, affirming a decision of the Assistant Comptroller, that the mark should be expunged from the register. In the view that I take of this case, there is an answer, and a comparatively short answer, to this E appeal, but I shall have to discuss to a certain extent the other matters that have been debated before us.

The mark in question was advertised in the *Trade Marks Journal* of July 6, 1932. It consists of the word "Livron"; it is registered in class 3 and it is registered in respect of "tonic medicines for human F use" by the appellants, Boots Pure Drug Co., Ltd. We do not know what was before the registrar at the date of the application, but we must assume that there was before him nothing of any moment to the consideration of this case. It so happens that, unknown apparently to the applicants for registration, there is in France a town of substantial G size, whose name is spelt in the same way, Livron. It is a town situate just to the east of the main road from Lyons to Avignon and Marseilles, a town of some 4,000 inhabitants, and it owes its appearance in this case to a rather remarkable coincidence, namely, that, at the time of the application to register the mark, the present respondents, who are H a French company or combine engaged apparently on a considerable scale in the manufacture of medicines for human consumption, had there, as they still have, either themselves or by a subsidiary, one of the factories at which they make medicines of various kinds. When they discovered the existence of the Livron mark on the register, they com-

plained, and, on Mar. 5, 1934, they launched an application under sect. 35 to rectify the register by expunging that mark. One would have thought, just looking at those bald facts, that if, when the matter came originally before the registrar on the application for registration, it had been pointed out to him that there was this town in France where
A medicine manufacturers were actually making medicines, he would at once have said: "This mark is not a suitable mark for registration, and I will refuse to register it." The mere statement of that fact would appear to suggest, and to suggest with overwhelming force, that a mark of that kind ought not to be registered. The appellants, when they
B adopted this mark, adopted it as a word which they had invented for the purpose of their trade, being a combination of the word "liver" and the word "iron," their intention being to use it, or at any rate that one of its uses should be, in connection with a tonic in which liver extract and iron were used, and it is in connection with that tonic that
C they have in fact used the mark. If those facts had been before the registrar, and he had, nevertheless, in spite of the existence of this factory in France, at Livron, registered the mark, in my judgment he would have been wrong in so doing, and the court, if the matter had come before it, would have reversed his decision.

D It is not, however, sufficient merely to state the facts, and to say that the conclusion from those facts is what I have said, but it is necessary to examine a little more closely the sections of the Act and the arguments that have been put before us. It is said, first of all, that the tribunal before whom an application under sect. 35 comes ought not to
E expunge a mark unless it is either one which could not have been registered, having regard to the words of the Act, or one which the registrar, although, on the language of the Act, he might have had power to register, ought not to have registered on the facts of the case. That proposition I am prepared, for the purpose of this discussion, to accept, and the
F matter therefore falls to be considered from two aspects, one being whether the registrar had power under the Act to register the mark, and the other whether he ought to have registered it on the particular facts of the case, having regard to the fact that, in the last resort, there is always an element of discretion in allowing registration.

G It is said that the registration would have been justified under three subsections of sect. 9 of the Act, or one of three subsections, and, in considering them, it is necessary to proceed on the hypothesis that the court is putting itself back to the date of the application, and is considering the matter on the footing that an application was then being
H made with the full facts before the registrar. The question it has to decide is whether, in the light of those facts, the case was one which fell within one of those three subsections. Then comes the further point which I have mentioned, that, assuming that it did, is it a case where, in the exercise of his discretion, the registrar ought to have refused registration? It is first of all said that the word is an invented

word within the meaning of subsect. (3). I myself am unable to accept that view. The meaning of the words "invented word" has been discussed in some authorities, but, apart from one case before Chitty, J., the *Eboline* case (1), we were not referred to any case where the question as to the application of this subsection to foreign place-names has been considered. The question of what is an invented word has been considered A in two cases which I can for shortness refer to as the *Solio* case (2) in the House of Lords, and the *Diabolo* case (3) before Parker, J. I myself do not find very much assistance from either of those cases in determining this question, which is whether the name of this town in France can be an invented word within the meaning of subsect. (3), but B I must say a word or two about them. First of all, in the *Solio* case (2), the word in question was the word "solio," which is not an English word at all, but is the Italian word for "a throne," and it was argued or suggested in the course of the case that the fact that it was the Italian word for "a throne" prevented it from being an invented word. But C the real contest in the case was whether, assuming it was an invented word, the words of subsect. (4), which, in cases falling under that subsection, prohibit a reference to the character or quality of the goods, apply also to subsect. (3), it being said on behalf of the Comptroller, who was the only other party to the proceedings, that the word "sol" D in "solio" suggested the sun, and that was illegitimate in the matter of photographic materials. That proposition was negatived, and it was assumed, without, apparently, the point's being argued, that "solio" was an invented word. I am myself unable to find any assistance in that case in the application of the subsection to the name of a place, E to which it seems to me that different considerations apply.

In the *Diabolo* case (3), Parker, J., stated two considerations which are essential before a word can be an invented word. One of them is that the word must be newly coined, and the other is in substance this, that the word must, besides being a newly-coined word, be also a word F which has got no obvious meaning to the ordinary educated Englishman. In the case of "solio," for instance, that would be a newly-coined word within the definition of Parker, J., which refers to words current in the English language. The word "solio" was not current in the English language at all. But the next question would be, although it is a word G not current in the English language, would it be a word that would convey an obvious meaning, as might very well happen if the word were, by some sort of a jingle or the presence of some element in it, one which suggested an obvious meaning to the English hearer? Now, those considerations are considerations the application of which to what I H may call foreign dictionary words—that is to say, words with a meaning in a foreign language—does not appear to me to present very much difficulty. But are they applicable to the case of a foreign place-name? Now, the first thing to notice is that a foreign place-name has an existence, and it has an existence not only for foreigners, but also for Englishmen, because, if any Englishman wished to refer to that place, that name is the only name which he could use. Take the case of Livron; I cannot bring myself to see that the word "Livron" can be an invented word in view of these facts, first, that it is the name, and the only name, of an existing place; and, secondly, that no Englishman could ever use any other name if he wished to refer to that place. How can a person be said to have invented a word of that kind? It is not at all like "solio," because an Englishman wishing to refer to throne uses the word throne; he does not use the word "solio." An Englishman wishing to refer to Livron can use only the word Livron, and nothing else. It appears to me that it is impossible, therefore, to say that Livron is an invented word, but, if it be thought that that is putting the matter too high, I still think that, in the circumstances of this case, having regard to the fact that at Livron this industry is carried on, it is quite impossible, in this context, to say that the word is an invented word.

The next subsection with which I must deal is subsect. (4), which says this:

> A word or words having no direct reference to the character or quality of the goods, and not being according to its ordinary signification a geographical name or a surname.

The important words there are the last ones that I have quoted, "not being according to its ordinary signification a geographical name or a surname." Now, we approach this subsection on the hypothesis that the word is not an invented word, for the reason that it is a word existing and having a definite meaning and a definite reference to one particular thing, namely, the place Livron. Approaching subsect. (4) on that basis, I do not see how it can be said that the word is, according to its ordinary signification, anything but a geographical name. If it is something else, what is it? It is *ex hypothesi* nothing, because you cannot for this purpose bring into consideration the meaning that it has acquired, or may have acquired, by its use in connection with Messrs. Boots' product. One has to look at it at the time when registration is applied for, and, at that time, what would the word "Livron" have meant in the mouth of any Englishman who was using that word in an intelligible sentence, and not merely talking gibberish? It would mean one thing, it seems to me, and one only, namely, the place. If you assume that an Englishman uses that word, he could use it with reference to the place, or else he must have been talking something that was unintelligible and gibberish. Now, that being so, it seems to me impossible to say that the word in the mouth of an ordinary Englishman, or the word to the ear of a person who understood what the speaker was saying, could have any signification other than a geographical one. It is worth remembering that subsect. (4) in its present form was modified some time after the *Magnolia* decision (4). Before that decision, the Act of 1888 contained an express prohibition of geographical names. The Act of 1905 qualified that by adding the words "according to its ordinary signification." The *Magnolia* case (4) had construed the original words very much in the sense of the section as it now stands, but, however that may be, the legislature has now, putting it beyond all possibility of doubt, provided for a case where a word has more than one signification, one of them being geographical and the other not, and it is possible to predicate of that word that, according to its ordinary A signification, it is not a geographical name. There could not be a better and fairer example of that than the *Magnolia* case (4) itself. But Mr. Swan argued that, under subsect. (4), it is possible to have a name which, although it is a geographical name, has got no ordinary signification at all, and, therefore, has not ordinarily got a geographical signification. B I am afraid that I am not able to follow that argument, because it seems to me that, once you find that a word fails to be an invented word because it is a geographical name, it is impossible to say that that is a word which has no signification, the reason being, as I see it, that, whenever that word is used with the intention to convey any meaning by it, it C will be used for the purpose of conveying a geographical meaning, and none other. In my opinion, subsect. (4) does not cover this case.

Then it is said that the case falls under subsect. (5), which says this :

> Any other distinctive mark, but a name, signature, or word or words, other than such as fall within the descriptions in the above paras. 1, 2, 3 and 4 shall not be D registrable under the provisions of this paragraph, except upon evidence of its distinctiveness.

" Distinctive " is defined as meaning :

> adapted to distinguish the goods of the proprietor of the trade mark from those of other persons.

E

Now, it is said that the mark itself, when presented originally to the registrar, could have been registered under that section as being a distinctive mark. It is to be observed that this subsection comes to be considered only on the hypothesis that the word " Livron " is a word or a name, and, accordingly, under the requirements of the section, it F shall not be registrable except upon evidence of its distinctiveness. Now, it is said that, if all the evidence which we now have had been before the registrar at the time of the application, the registrar could properly have registered the mark, on the footing that he was satisfied that it was a distinctive mark. In my opinion, that is not so. It seems G to me that, if the registrar had had before him all the matter which is before this court, he would have been wrong if he had granted registration of this mark, because, the mark being, as I say, *ex hypothesi*, the name of a place, and the name of a place where medicines of a similar character are manufactured, and it appearing that the business in medicine is of H an international character, or the names of medicines, I think the evidence says, are international, I cannot see myself how the registrar could with any propriety at all have held that the mark was distinctive. It appears to me, therefore, that, even conceding to Mr. Swan several propositions which Mr. Burrell hotly contested, he would fail on the ground that I have stated. But Mr. Burrell said that some of the assumptions which I have made in Mr. Swan's favour ought not to be made, because he said, in the first place, that the mark was inherently incapable of registration, because at the time no evidence of its distinctiveness in fact was produced, and that, if one is dealing with a name, A signature or word, there must be evidence of that character produced before the registrar has any jurisdiction to grant the registration. That is a matter which opens up some questions that are not too easy to decide, and, on the facts of this case, it appears to me to be unnecessary to go into them. But, in making the assumption in Mr. Swan's favour B that the mark could have been registered without the production of evidence that it had in use become distinctive, it must not be assumed that I consider that the proposition is one that has been established. I decide the matter, so far as this subsection is concerned, upon the ground that, even assuming the registrar had power to register the mark, he C would have been wrong if he had treated its distinctiveness as proved.

That, I think, covers all the subsections, but I must refer to the other aspect of the argument. It is said that, even if the matter comes within one or other of those three subsections, nevertheless the registrar upon the original application would have had a discretion, in other words, that D it is not enough for a word to be an invented word or a word under subsect. (4), because, even if it is, the registrar nevertheless is entitled under the exercise of his discretion to say: "Well, on the particular facts of this case, the mark is one which ought not to be registered"; and it is said that, on the facts of this case, even if the word were an invented E word, or were not, in its ordinary signification, a geographical name, in spite of that the registrar ought not to have registered. I myself take that view, and I think that, even if I am wrong in holding that this is not an invented word, and that its ordinary signification is geographical, nevertheless, on the particular facts of this case, if the registrar had F registered it, he would have been exercising his discretion in a way which this court would have overruled if the matter had come before it, and I say that in relation, of course, to the particular facts which are now known.

I have not said anything, so far, about another matter, namely, G sect. 11, which provides that:

> It shall not be lawful to register as a trade mark or part of a trade mark any matter, the use of which would by reason of its being calculated to deceive or otherwise be disentitled to protection in a court of justice . . .

It is not very clear what view was taken by the Assistant Comptroller H or the judge as to the applicability of that section. It is to be remembered that that section is one which exists, not merely for the benefit of other traders, but for the benefit of the public at large, and I myself take the view that this is a case where the registrar, who, in the first instance, would have to decide the issue of fact under that section, if he had had all the facts before him which we now have before us, ought to have held that the use of the mark would have been calculated to deceive. It appears to me to be quite insufficient to displace that proposition to say that in practice the use of the mark has not deceived. The use of the mark has been limited in the past to its use in a particular way and in a particular context. But since, under the registration, the mark can be used as a registered mark in connection with anything A falling within the class (and it can be used with or without the words on the cartons, bottles, and so forth), the question is whether the use of the mark in any way in which it can be used as a mark would be calculated to deceive. It appears to me that the use of the mark ought to be held to be calculated to deceive, having regard to the existence, in a place of B the same name, of a company carrying on the same business, and manufacturing articles of the same class. I have endeavoured to deal with all the points that have been put before us. In my opinion, the Assistant Comptroller and the judge were quite right in the view which they took in this case, and the appeal must be dismissed. C

I should add one further matter. A suggestion was made that the court might exercise its power under sect. 35, and, instead of ordering the removal of the mark from the register, order a variation of it, and it was suggested that a variation, under which the words " trade mark " and " brand," I think, were added, would be sufficient. In my opinion, D the addition of those words would not be sufficient, on the facts of this case, to prevent the possibility of confusion and deception taking place ; nor would they have the effect of getting rid of the objections to the mark which I have endeavoured to specify, and that application, therefore, cannot succeed. E

Romer, L.J. : I agree that this appeal must be dismissed, on the ground that, even assuming the word " Livron " comes within the Trade Marks Act, 1905, s. 9 (3), (4), (5), registration ought to have been refused, either because, under sect. 11, the mark would be calculated to deceive, F in the circumstances to which Sir Wilfrid Greene, M.R., has referred, or because, if, with full knowledge of the facts as now known to us, the registrar, in the exercise of his discretion, had allowed the registration to take effect, he would have been plainly wrong, and would, had an appeal been brought from his decision in the light of those facts, been G overruled by the court. In those circumstances, it is not strictly necessary for me to deal with the many arguments that have been laid before us on one side or the other as to the true meaning and effect of the subsections of sect. 9 to which I have referred, but, in deference to those arguments, and as I regret that I do not see altogether eye to eye with H Sir Wilfrid Greene, M.R., in the view that he has taken of those subsections, I would like to add a few words myself.

Dealing with the words in subsect. (3), " An invented word or invented words," I confess that I should very much regret coming to the conclusion that a word wholly unknown to an ordinary Englishman was not an invented word merely because, on investigation in some gazetteer or atlas or anything of that kind, it was found that there existed in a foreign country a place or a person whose name was identical with, or substantially identical with, the word proposed to be registered. No one except PARKER, J., has ever attempted to define the meaning of those words A used in that subsection. He did so in the case to which SIR WILFRID GREENE, M.R., has referred, which is usually mentioned as the *Diabolo* case (3). PARKER, J., who knew more about trade mark law than most people, said this at p. 279 :

> To be an invented word within the meaning of the Act, a word must not only be B newly coined in the sense of not being already current in the English language, but must be such as not to convey any meaning, or at any rate any obvious meaning, to the ordinary Englishmen.

Now, it will be observed that his language is quite general. He says it must be newly coined in the sense of not being already current in the C English language ; but I confess that a word that happens to be the name of some foreign place or resident, and which is not in use in this country, or has never been in use in this country, as an ordinary English word, comes within that definition. It is true that the word has to satisfy another test. It has not only to be not current in the English D language, but also to be a word that will not convey any meaning, or, at any rate, any obvious meaning, to the ordinary Englishman. Of course, there is a great number of foreign names which do and will convey an obvious meaning to an Englishman, but the words that I am thinking of are words which have never been known, never been E heard of, except perhaps by a quite negligible minority of English people, and which, to the ordinary Englishman, would not convey any meaning and still less the obvious meaning. I do not, by those observations, intend to suggest for one moment that, for that reason, " Livron " is an invented word. It is true, in the sense which I have given to it, and F which I think PARKER, J., intended to give to the phrase, the word is not current in the English language, but it is a place of 4,000 inhabitants, situate in a neighbouring country which is visited every year by thousands of our fellow-countrymen, and I should think it is more than likely that the word " Livron," especially having regard to the fact that there G is this factory there, which has been there since somewhere near 1928, I understand, may convey the obvious meaning to the ordinary Englishman.

The next point on which I wish to make one or two observations is as to whether, assuming it not to be an invented word, it can be said to H be a word not being, according to its ordinary signification, a geographical name or surname within the meaning of subsect. (4), because, plainly, it has no direct reference to the character or quality of the goods. The question which arises on that subsection seems to me to be this, so far as the arguments in the present case have been addressed to it : can it be said of a word that has no signification whatsoever to the ordinary

Englishman that it is, according to its ordinary signification, a geographical name ? I confess that I myself can give only one answer to that question. If it has no signification to the ordinary Englishman, it certainly cannot have a geographical signification. Now, it is said that to adopt such a construction as that would embark the registrar or the court upon a very difficult enquiry as to whether the name of a certain A place does or does not ordinarily bear a geographical signification to the ordinary Englishman, but the court has to deal with such difficult enquiries under this Act. Whatever construction is placed upon this subsection, a difficult enquiry at once becomes apparent when the matter is brought to the attention of the court. Supposing that Mr. Burrell B is right, and the subsection applies only where you have got a name which is the name of a place, but is also the name of a thing, the court still has to consider whether or not its ordinary signification is geographical. In that case, the task is no more difficult than when the court has to consider whether a word ordinarily bears a geographical signification, C there being no similar word in the English language. The truth of the matter is that the court has to conduct these enquiries, enquiries, really of a very nebulous nature, but it must be remembered, as has been pointed out so often, that, when a case is on the borderline, the registrar has, as of course he has in every case, a discretion, and, in cases on the D borderline, the registrar will usually refuse to exercise his discretion in favour of registration.

Upon subsect. (5) I do not think that I have anything to add to what has been said by Sir Wilfrid Greene, M.R. If a case does not fall within subsect. (3) or subsect. (4) dealing with a word like "Livron," E then plainly, *prima facie*, it is not adapted to distinguish, because it will fail to be an invented word, by reason of the fact that it will bear an obvious meaning to the ordinary Englishman ; but it does not fail to be an invented word, or fail to be a word not bearing an ordinary geographical signification, because it will ordinarily bear such a significa- F tion to an Englishman. Therefore, when one comes to subsect. (5), in such cases as the present, one starts with this, that, *prima facie*, the word is not adapted to distinguish, but, nevertheless, I have to agree with Mr. Swan that the evidence to show that, nevertheless, it is adapted to distinguish need not consist of evidence as to actual user. I think G evidence that the word, not at large, but in connection with the particular goods to which it is sought to apply it as as a trade mark, is adapted to distinguish, will be sufficient. In the present case, it is quite plain, I think, that the applicants have failed to produce any such evidence. The words, being *prima facie*, for the reasons that I have H mentioned, inherently incapable of distinguishing the goods, become still less capable of distinguishing the goods when it is pointed out, as it would be pointed out, that it is intended to use the words in connection with medicines, and that, at a place in France, called Livron, medicines of that kind, or of a not very dissimilar kind, are manufactured.

MacKinnon, L.J.: I agree that this appeal fails, and I can very
shortly state the way in which the case strikes me. "Livron" is not,
and cannot be, an invented word within sect. 9 (3) for the reason that it
is an existing word, a word with a known or ascertainable meaning, and
is the name of a town in France. I think that the *Eboline* case (1) rightly
A decided that a foreign place-name cannot be an invented word within the
meaning of sect. 9 (3). That, of course, would be subject to the rule *de
minimis*. If a trader, so far as his knowledge went, invented a new word,
if it were subsequently shown that his invented word was in fact the name
of a field in a rural parish, or the name of an unclimbable peak in the
B Himalayas, I do not think that that fact would impair the validity of
his claim that the word was an invented word. But any such considera-
tion as that does not apply to this case, because Livron is a fair-sized
town in France, with factories in it. If Livron is not admissible, under
subsect. (3), as an invented name, because it is the name of a foreign
C place, I think it follows that it is not admissible under subsect. (4), seeing
that, in its only signification, it is a geographical name, and its only
signification must be its ordinary signification. It is true that, in the
Magnolia case (4), a place-name was not the only signification of that
word, and there was therefore room for enquiry whether the place-
D name was its ordinary signification. I suppose it is probable that it
was because of the existence of the *Magnolia* case (4) that the words
"according to its ordinary signification" were added to the words
"geographical name" in this Act of 1905. In this case, unlike the
Magnolia case (4), the place-name is the only signification of the word,
E as a real and not as an invented word. Therefore, the enquiry whether
the place-name is geographical in its ordinary signification seems to me
to be unavoidable. It ordinarily suggests a choice between that which
is usual and that which is unusual, or less usual, and, if there is but one
meaning, it cannot be more or less usual. I think the truth is that the
F argument that the "geographical" is not the ordinary signification of
this word, because English people generally did not know of it, is in truth
an argument logically addressed to the proposition that the word is
meaningless in England, and, therefore, is an invented word, and allow-
able under subsect. (3): but, as I have said, I think that, because it is
G in truth a foreign place-name, and cannot be an invented word, and
because its only signification as a real word is a geographical one, then,
necessarily, it becomes inadmissible under subsect. (4).

The remaining subsection under which some attempt was made to
justify this mark is subsect. (5). I think that it is sufficient with regard
H to that to say that there is no evidence that this mark is distinctive of
the appellants' goods except in so far as the word may be said to be
self-evident. Upon that, if the word is self-evident, and, being self-
evident, is distinctive of any class of goods, it seems to me that it can
clearly be distinctive only of the chemical products of the respondent
company, though the use of the name would be equally barred to them

as a trade mark, by reason of the fact that it is a geographical name. I agree that the appeal fails.

Appeal dismissed with costs.

Solicitors: *Seaton, Taylor & Co.* (for the appellants); *G. B. & L. Ellis* (for the respondents).

[*Reported by* Derek H. Kitchin, Esq., *Barrister-at-Law.*]

WILLIAMS *v.* JOHNSON (since deceased), now represented by WILLIAMS AND ANOTHER.

[Privy Council (Lord Russell of Killowen, Lord Roche, Sir Lancelot Sanderson), **June 1, 3, 4, July 19, 1937.**]

Privy Council—West Africa—Voluntary conveyance—Medical practitioner and patient—Setting aside at instance of patient—Presumption of undue influence.

Appellant, a medical practitioner, and an intimate friend of the respondent, an elderly widow, attended her professionally during two illnesses in the years 1928 and 1930. He made no charge for his professional services or for the medicines supplied, and had stated that he did not regard her as a paying patient. After her recovery from the second illness, the respondent, in 1931, executed a deed, by which she purported to convey to the appellant certain freehold land, together with the building thereon, for the sum of £1,500, but it was not in dispute that no consideration money was paid. Subsequently the respondent instituted proceedings to have the conveyance set aside and a reconveyance of the property made to her, alleging that the deed was executed by her under the influence of the appellant, her medical attendant, and without independent advice. The deed was explained to the patient by her solicitor, but he was unaware of the proportion the property conveyed bore to her whole estate. Both parties were alive at the date of the trial, and gave evidence:—

Held: (i) the relationship of doctor and patient existed between the parties.

(ii) a person giving independent advice must be aware of the total amount of the donor's property and the proportion the part given bears to the whole.

(iii) the onus, which lay upon the appellant, to prove that the gift was the result of the free exercise of the respondent's independent will having been discharged to the trial judge's satisfaction, the court in the circumstances of this case could reverse such finding only if there was no evidence at all to support it.

Inche Noriah v. *Shaik Allie Bin Omar* (2) *applied.*

[EDITORIAL NOTE. In considering cases of undue influence as between doctor and patient, the court rarely has the advantage of seeing and hearing the evidence of both parties. If the trial judge, seeing the patient who is alleged to have been influenced, is satisfied that he or she is a person of such independent will that it is unlikely that there was any absence of that free exercise of the will necessary to support a voluntary conveyance, a court of appeal will not reverse such a finding unless there is no evidence whatever to support it.

As to Undue Influence as Between Doctor and Patient, see HALSBURY, Hailsham Edn., Vol. 15, p. 281, para. 502; and for Cases, see DIGEST, Vol. 25, p. 264, Nos. 883-891.]

Cases referred to:

(1) *Colonial Securities Trust, Ltd.* v. *Massey,* [1896] 1 Q.B. 38; Digest, Practice, 770, *3350*; 65 L.J.Q.B. 100; 73 L.T. 497.

(2) *Inche Noriah* v. *Shaik Allie Bin Omar,* [1929] A.C. 127; Digest Supp.; 98 L.J.P.C. 1; 140 L.T. 121.

A APPEAL from a judgment of the West African Court of Appeal (MACQUARRIE, STROTHER-STEWART, BROOKE, JJ.) dated Apr. 16, 1935, allowing the respondent's appeal from a judgment of the Supreme Court of Sierra Leone (WEBBER, C.J.), dated Oct. 1, 1934. The facts of the case are set out in the judgment of their Lordships delivered by SIR LANCELOT SANDERSON.

B *Harold S. Simmons* and *Leonard Pearl* for the appellant.

R. O. Wilberforce for the respondents.

SIR LANCELOT SANDERSON: The action was brought by an old widow lady, Mrs. Johnson, who at the time of the matters complained C of in the action was some 82 or 83 years of age. The defendant is a medical man, who had on the occasions of two illnesses of the plaintiff (in the years 1928 and 1930) attended her professionally. He was not what she called her "family doctor," but he was an intimate friend of hers. He apparently made no charge for his professional services; D he said, "I never regarded her as a paying patient. I never charged her for the medicines." The 1930 illness was occasioned by the old lady falling down, and it lasted throughout the month of Aug., 1930; but by the end of the month her cure was complete. On Feb. 4, 1931, she executed a deed of that date, by which she purported to convey E to the defendant in fee simple certain land in Charlotte Street, Freetown, together with the building thereon. The deed purports to be a conveyance on sale for £1,500, but it is not in dispute that there never was a sale. The conveyance must be treated as a voluntary conveyance. On July 9, 1932, Mrs. Johnson issued her writ, and on Mar. 31, 1933, F she delivered her statement of claim. By that document she claimed to have the conveyance set aside and a reconveyance of the house and land by the defendant to her. Her claim, as appears from the allegations in paras. 2, 3 and 4 of the statement of claim, was based on two grounds: (i) that the deed was executed by her under the influence G of the defendant, her medical attendant, without independent advice, and (ii) that she executed the conveyance in ignorance of its true nature. This second allegation, which looks like a charge of fraud against the defendant, has in fact disappeared from the case, and may be disregarded. The case was tried and decided on two issues only, viz.: H (i) were the defendant and plaintiff in the confidential relationship of doctor and patient? and (ii) was the influence which, by reason of the existence of that relationship, is presumed to have produced the gift, rebutted by the defendant?

Having had the great advantage of hearing the witnesses, WEBBER, C.J., held that on the evidence the true relationship was more like that of mother and son, and that it was "difficult to understand how a casual attendance on two occasions . . . can be said to create such a relationship as to make that relationship of a confidential and fiduciary character." He further held that, even assuming that such a relationship had been established, the presumption of influence had been rebutted. It had, he said, been proved to his satisfaction, having regard to all the circumstances, "that the gift was the result of the free exercise of independent will." The Court of Appeal took the contrary view upon both points. They were of opinion (i) that the relation of doctor and patient existed between the parties, and (ii) that the presumption of influence had not been rebutted by the defendant. Against this decision of the Court of Appeal the defendant has appealed to His Majesty in Council. Their Lordships appreciate that the reversal of the findings of fact of a judge who has tried the case without the assistance of a jury is well within the competence of an appellate court, who are in fact re-hearing the case; but as was well said by Lord Esher, M.R., in *Colonial Securities Trust, Ltd.* v. *Massey* (1), the case cited by Brooke, J., in his judgment, the presumption is that the decision of the trial judge on the facts was right, and that presumption must be displaced by the appellant. In considering what advice they should tender to His Majesty in the present case, the question for their Lordships to answer is in effect the same. Has the plaintiff displaced to their satisfaction this presumption of the correctness of the view entertained by the trial judge?

As regards the first question, the answer is, they think, in the affirmative. Webber, C.J., seems to have paid insufficient attention to the basis upon which the presumption of influence arising from this intimate relationship rests. He dismisses the question by describing the defendant's attendances as "a casual attendance on two occasions." That conclusion is not, in their Lordships' opinion, justified by the evidence. So far from being "casual," the attendances represented attention and care by the defendant to his patient throughout the courses of the two illnesses. The illness of 1930 was clearly no light matter, as the defendant attended the plaintiff during the whole of August, and was one which afforded just such an opportunity for generating those feelings of confidence and gratitude, calculated to produce the influence (no doubt unconsciously operative) which creates a desire to confer benefits on the medical adviser and against which the patient requires protection. Upon this first question, their Lordships agree with the Court of Appeal that in this case the question of the validity of the gift made by the plaintiff by the conveyance of Feb. 4, 1931, must be dealt with upon the footing that the donor and donee stood in the relationship of patient and doctor or had stood in that relationship so recently as to necessitate that the defendant should rebut the presumption of influence arising from that relationship. The principle which applies to the second issue is to be found in the judgment delivered by Lord Hailsham, L.C., in *Inche Noriah* v. *Shaik Allie Bin Omar* (2). It may be stated as follows: where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor, the court will set aside the voluntary gift unless it is proved that in fact the gift was the spontaneous act of the donor acting in circumstances which enabled the donor to exercise an independent will and which justify the court in holding that the gift was the result of a free exercise of the donor's will. In the case cited the question was discussed whether the presumption can be rebutted in any other way than by proof of independent legal advice and also as to what constituted sufficient independent legal advice. Their Lordships were not prepared to accept the view that independent legal advice is the only way in which the presumption can be rebutted; and they were not prepared to affirm that legal advice, when given, does not rebut the presumption, unless it be shown that the advice was taken. They held that it was necessary for the donee to prove that the gift was the result of the free exercise of the independent will of the donor. It was pointed out that the most obvious way to prove the above-mentioned fact is by establishing that the gift was made after the nature and effect of the transaction had been fully explained to the donor by some independent and qualified person so completely as to satisfy the court that the donor was acting independently of any influence from the donee and with the full appreciation of what he was doing, and in many cases where there are no other circumstances this may be the only means by which the donee can rebut the presumption. The fact, however, to be established, said their Lordships, was that which has been already stated, and if evidence is given of circumstances sufficient to establish that fact they saw no reason for disregarding them merely because they do not include the advice from a lawyer. They refused to lay down what advice must be received in order to satisfy the rule where independent legal advice is relied on further than to say that it must be given with a knowledge on the part of the adviser of all relevant circumstances and must be such as a competent and honest adviser would give if acting solely in the interest of the donor. WEBBER, C.J., referred to the decision in the above-mentioned case and adopted the principle therein stated. He came to the conclusion that the plaintiff was aware of the true nature of the transaction, that she deliberately chose a conveyance (meaning a document which was in form a conveyance for value) in preference to a deed of gift, that she signed the deed well-knowing the contents thereof, that the contents were read out to her, and that she understood everything that was said to her at the time. He recognised that the onus was upon the defendant to prove that the gift was the result of the free exercise of the plaintiff's independent will, and as already stated he held that this had been proved to his satisfaction, having regard to the circumstances.

In their Lordships' opinion the question for decision in this appeal is whether there was evidence which justified Webber, C.J., in arriving at the above-mentioned findings. The fact that the plaintiff had the benefit of the advice of Mr. Barlatt, the solicitor, of whose independence Webber, C.J., was satisfied, and who was selected by the plaintiff herself to prepare the deed, cannot be relied upon as sufficient by itself to rebut the presumption of influence by the defendant, because it was not proved that Mr. Barlatt had a knowledge of all relevant circumstances and it was for the defendant to prove it; in particular it was not proved that Mr. Barlatt knew the total of the plaintiff's property or what proportion the portion conveyed to the defendant bore to the said total. But it was not upon the advice given by Mr. Barlatt, the solicitor, to the plaintiff that Webber, C.J., either solely or chiefly relied. It is material, however, to note that the solicitor explained to the plaintiff the other legal forms of carrying out her intention, viz.: by a deed of gift or by a will which could be revoked, but that the plaintiff preferred the form of a conveyance for value and that the plaintiff told the solicitor that she had thought it all out and that she knew what she was doing. The plaintiff's preference for the form of a conveyance for value probably was not uninfluenced by litigation with another claimant to her property. There were other matters which need not be mentioned in detail, such as the withdrawal of her will, her arrangements as to the interim dealing with the rents of the property, and another gift of property at and about the same time to a Mrs. Williams, which Webber, C.J., was entitled to and did take into consideration.

There is, however, one matter which in their Lordships' opinion is of very great importance and which distinguishes this case from other cases in which a question, similar to that now under consideration, has arisen. In many of such cases the question came up for consideration after the donor was dead. In this case, however, both the donor and the donee, the plaintiff and the defendant, were available as witnesses and gave evidence at the trial. Webber, C.J., therefore had the great advantage of seeing both parties in the witness-box, and of hearing their evidence. He came to the conclusion that the plaintiff was well-educated and did not betray any sign of mental weakness and that she had competently administered her son's estate. This finding, in their Lordship's opinion, is supported by the evidence of Mr. Barlatt which goes to show that she was an intelligent, astute and strong-willed woman. Webber, C.J., did not believe the evidence of the plaintiff, and he accepted unreservedly the evidence of the defendant. Their Lordships see no reason to dissent from such finding, given as it was by one who was in a much better position to judge of the matter than their Lordships. In view of that finding and the other evidence in the case, it is not surprising that Webber, C.J., came to the conclusion that the presumption of influence by the defendant upon the plaintiff had been rebutted and that the transaction was the result of the free exercise of the plaintiff's independent will.

WEBBER, C.J., applied the correct principle to the consideration of the matter, and their Lordships are of opinion that there was sufficient evidence to justify him in arriving at the above-mentioned conclusion, and consequently that his decision should not have been disturbed. The result is that the appeal must be allowed, the order of the Court
A of Appeal dated Apr. 16, 1935, set aside, and the judgment of WEBBER, C.J., of Oct. 1, 1934, restored. The plaintiff having died, her legal personal representatives were made respondents to the appeal, and they must pay the defendant's costs in the Court of Appeal and of the appeal to His Majesty in Council. Their Lordships will humbly advise His
B Majesty accordingly.

Appeal allowed with costs.

Solicitors: *Leader, Plunkett & Leader* (for the appellant); *Lawrence Jones & Co.* (for the respondents).

[*Reported by* T. A. DILLON, ESQ., *Barrister-at-Law.*]

C

HANLON AND OTHERS *v*, PORT OF LIVERPOOL STEVEDORING CO., LTD.

D [LIVERPOOL SUMMER ASSIZES (Lewis, J.), **June 17, 18, 1937.**]

Negligence—Breach of statutory duty—Loading ship—Loading at intermediate deck—Stowage on hatch covers—Duty to strengthen hatch covering—Duty on shipowner and not on employees—Docks Regulations, 1934 (*S.R. & O.*, 1934, *No.* 279), *regs.* 36, 37 (*b*), 38.

E Five stevedores were loading a ship, and, following instructions given to them by the hatch foreman, a servant of the defendant company, placed 49 tons of iron upon a between-deck hatch covering. The hatch covering collapsed and the plaintiffs fell into the hold and were injured. The claim in negligence was barred by the doctrine of common employment, and reliance was placed upon a breach of statutory duty imposed by the Docks Regulations, 1934, regs. 36, 38, made under the Factory
F and Workshop Act, 1901. Reg. 36 requires a deck-stage or cargo-stage to be substantially constructed, and reg. 38 provides that no cargo shall be loaded or unloaded by a fall or sling at any intermediate deck unless either the hatch at that deck is securely fastened or a secure landing platform has been placed across it:—

HELD: (i) the court was bound by the dictum of SCRUTTON, L.J., in *Hillen & Pettigrew* v. *I.C.I.* (*Alkali*), *Ltd.* (1), to hold that the hatch
G of a ship is not a deck-stage or cargo-stage within the meaning of that word in reg. 36.

(ii) the placing of the weight of iron upon the hatch coverings when they were not so strengthened and reinforced as to be capable of bearing the weight imposed upon them was a breach of reg. 38.

(iii) reg. 38 imposes a duty upon the shipowner and does not impose a duty upon the persons employed in the process of loading or unloading.
H It could not, therefore, be said that the plaintiffs were guilty of any breach of statutory duty.

[EDITORIAL NOTE. So far as reg. 36 was concerned, this case was treated as covered by authority in a court of first instance, though the point was reserved in case there should be an opportunity of arguing it upon an appeal. As to the construction of reg. 38, which found favour with the court, it was unsuccessfully argued that stowage on hatch covers was an everyday practice, and that the regulations should be construed in the light of current practice.

As to Regulations and Dock Regulations, see HALSBURY, Hailsham Edn., Vol. 14, pp. 614-621, paras. 1169-1174; and for Cases, see DIGEST, Vol. 24, pp. 908-911, Nos. 62-81.]

Case referred to: A

(1) *Hillen & Pettigrew* v. *I.C.I. (Alkali), Ltd.*, [1934] 1 K.B. 455; [1936] A.C. 65; Digest Supp.; 104 L.J.K.B. 473; 153 L.T. 403.

Action by five stevedores for breach of a statutory duty under the Factory Act, 1901. Docks Regulations, 1934, regs. 36, 38, are set out in the judgment. Reg. 37 (*b*) is as follows: B

> Hatch coverings shall not be used in the construction of deck or cargo stages, or for any other purpose which may expose them to damage.

G. J. Lynskey, K.C., and *H. I. Nelson* for the plaintiffs.

Wilfrid Clothier, K.C., and *S. Scholefield Allen* for the defendants.

C

Lewis, J.: The five plaintiffs in this case are dock labourers, who, on Feb. 14, 1936, were employed by the defendant company, which carries on the business of stevedores. The plaintiffs were employed in loading the S.S. "Baronesa," which was lying at the Brocklebank Dock in Liverpool. The five plaintiffs were members of a gang of eight so D employed. Three of those eight were working under the direction of the plaintiff Potts, and a man named Cook was in charge of the other three. Potts and his three men were in charge of the starboard side, Cook and his three men were in charge of the port side. On the day in question, they started working on the No. 5 after-hatch of the lower hold. This E hold was being loaded with light machinery in crates. Between 4 p.m. and 5 p.m. orders were given to cease loading this hold, to cover up the hatches, and to start on loading wire in the between-decks space forward of No. 5 hatch. The men so employed covered the hatches and proceeded to load the wire as instructed by the hatch foreman, a servant of the F defendant company, named McAdam, who took his orders from another servant of the defendant company, named Craig, the ship's foreman. The hold into which the machinery had been stowed was an insulated hold, and the evidence given before me was that the hatch coverings were of somewhat lighter construction than the ordinary hatch coverings G of an ordinary vessel. The "Baronesa" was a vessel which brought frozen meat, stowed in these insulated holds, from the Argentine and returned to the Argentine with general cargo. When she was loaded with meat, the meat was hung on hooks, affixed to bars known as "bull bars," which were detachable, and were fixed cross-wise in the hold. H These bull bars could be used, with the addition of packing, to strengthen the hatch coverings when the ship was loaded with general cargo, but, on this occasion, the hatch covering was not strengthened in this way, and evidence called by the defendant company was to the effect that the plaintiffs and those working with them were not at fault in not strengthening the hatch covers by the use of the bull bars and packing. Indeed they had no right to do it unless they were so ordered by either McAdam or Craig. When the order to cover the hatches and to stow the wire was given, none of the plaintiffs knew that the loading of the lower hold through No. 5 hatch was completed. As Craig stated in evidence:

> A The plaintiffs and those working with them did not know when they put on the hatch covers that they might not have to load further cargo in the hold. It would not have been proper to put on the bull bars. I gave no orders to put on the bull bars.

After loading the wire, orders were received to load in the between-decks, in the space known as the "trunk-way," bundles of black iron. The B plaintiffs were ordered to close the doors through which they had been previously carrying the wire, and to lay scantlings across the top of the hatches. Having done this, bundles of black iron were lowered into the trunk-way on to the between-decks, and were stowed in rows of five on the hatch coverings. Each bundle of black iron weighed one ton, and, C when the forty-ninth bundle had been placed into position, with the five plaintiffs on top of the pile, the fore-and-afters, which supported the hatch covering, broke, owing to too great a weight having been placed upon them, and the bundles of black iron collapsed into the hold on top of the crates of light machinery, taking with them the five plaintiffs, who were D buried among the bundles of black iron, and received very severe injuries. The bundles of black iron were so loaded under the orders of Craig, transmitted to the plaintiffs through McAdam. Craig knew that there were 50 tons of this black iron to be loaded, and gave the order that it should be loaded on top of the hatch in the place where it was in fact E loaded. The plaintiffs did not know the number of bundles, or the weight which were to be so loaded: the actual weight which the fore-and-afters of the hatch coverings had to bear was some 38 tons, some of the bundles of iron being spread on the between-deck alongside the hatch, so that the whole weight of 49 tons did not actually bear upon the fore-and-afters F of the hatch coverings. The actual strain which any of the fore-and-afters could bear was in fact very much less than 38 tons, and one witness stated that he thought the limit of safety was 9 tons.

The case, however, was not put solely upon negligence; it was put alternatively as a breach of statutory duty, and reference was made to G the Factory and Workshop Act, and to the Regulations of 1934 made thereunder. Two were referred to. The first was reg. 36, which says:

> No deck-stage or cargo-stage shall be used in the processes unless it is substantially and firmly constructed and adequately supported, and, where necessary, securely fastened.

The other regulation referred to was reg. 38:

> H No cargo shall be loaded or unloaded by a fall or sling at any intermediate deck unless either the hatch at that deck is securely covered or a secure landing-platform of a width not less than that of one section of hatch covering has been placed across it. Provided that this regulation shall not apply to any process of unloading the whole of which will be completed within a period of half an hour.

Now, with regard to the first of these regulations, my attention was drawn to the case of *Hillen & Pettigrew* v. *I.C.I.* (*Alkali*), *Ltd.* (1). In that case, reg. 33A of the 1925 Dock Regulations, made under the Factory and Workshop Act, 1901, was considered. Reg. 36 of the 1934 Dock Regulations, under consideration in this case, is exactly similar to reg. 33 (*a*) of the 1925 Dock Regulations. In *Hillen's* case (1), SCRUTTON, L.J., expressed the view that the ordinary deck of a ship, or the hatch of a barge in its ordinary closed condition, is not a deck-stage or cargo-stage within the regulations. That case went to the House of Lords, where their Lordships did not deal with the particular interpretation of that regulation, but stated that it was unnecessary, in the view which they took in that case, in any way to canvass the opinions expressed in the Court of Appeal. The view, therefore, of SCRUTTON, L.J., with regard to this regulation stands, and binds me. Mr. Lynskey very properly admitted this, and said that, although reserving the point, he was unable to contend before me that any breach of reg. 36 (*a*) had been committed; but, he argued, what had happened on this occasion was undoubtedly a breach by the defendant company, through its servants, Craig and/or McAdam, of the statutory duty imposed upon it by reg. 38, in that, during the loading of cargo by a fall or sling at an intermediate deck, the hatch of that deck was not securely covered. He argued that "securely covered" meant was protected during the course of loading by a fall or sling so as to be able to support any weight placed upon it. The placing of this weight upon the hatches when they were not so strengthened or reinforced as to be capable of bearing the weight so superimposed was, in my opinion, a breach of reg. 38. This regulation imposes a duty upon the shipowner. That duty is owed by him to those working on the processes, which, in this case, was the process of loading. It was argued that that regulation imposed a duty upon the workman and upon persons employed in the processes, so that the plaintiffs themselves were guilty of a breach of statutory duty, but I am unable to accede to that view. The statutory duty imposed is not a duty owed by the persons employed to their employer. I am of opinion, therefore, that the defendant company, if guilty of a breach of statutory duty, is unable to escape its liability, when it is in the position of employer, by saying that its servants, who have been injured owing to the breach of statutory duty by the employer, were themselves guilty of a breach of statutory duty. It was argued by Mr. Clothier, for the defendant company, that reg. 38 did not apply to such a case as the present. He argued that "securely covered" meant merely the covering of the hatch so that it would take a reasonable weight during the process of loading or unloading by a fall or sling. He argued that reg. 37 (*b*) covered this case. He argued that, if he was right in his construction of reg. 37 (*b*), reg. 38 could not be so construed, because, among other reasons, two regulations would be found dealing with the same set of circumstances, and he prayed in aid the judgment of SCRUTTON, L.J., in *Hillen's* case (1), where that judge stated that, in his opinion, where heavy cargo is placed on hatches for the purpose of loading from them, they are used for a purpose which may expose them to damage, and that, therefore, such conduct was a breach of that regulation. In the House of Lords, LORD ATKIN, though not expressly dealing with the construction of this regulation, as it was unnecessary, in the view which their Lordships took, so to do, suggested that reg. 37 (*b*) (or the corresponding regulation in the 1935 Regulations, reg. 34 (*b*)) might bear an interpretation other than that placed upon it by SCRUTTON, L.J. LORD ATKIN said, at p. 68 :

> The rules admit of doubt as to whether this wording is applicable to hatch covers placed in position.

The case of *Hillen* (1) was a very different case from this, in that there the hatch was being used for loading, *i.e.*, the cargo was placed on the hatch covers of a barge from which it was loaded into the ship. In my view the circumstances of this case were very different, and I would point out that SCRUTTON, L.J., goes no further than saying that this regulation imposes a duty not to use a hatchway from which to load cargo into a ship. He does not deal with the case of stowing cargo upon a hatch. The evidence in this case satisfies me that it is a common practice to load cargo upon hatches, and I am unable to find that that universal practice is an illegal practice. I am of opinion that reg. 37 (*b*) does not cover the present case On the other hand, as I have already said, I am of opinion that this case is covered by reg. 38, a regulation of which the plaintiffs were not in fact aware, and that, in failing securely to cover the hatch, there was a breach of duty on the part of the employers, and that they are liable to the plaintiffs for the injuries which resulted from a breach of the statutory duty.

Solicitors : *G. J. Lynskey & Sons* (for the plaintiffs) ; *Weightman, Pedder & Co.* (for the defendant company).

[*Reported by* M. D. CHORLTON, *Barrister-at-Law.*]

Re J. FRANKLIN & SON, LTD.

[CHANCERY DIVISION (Crossman, J.), **June 1, 2, 3, 4, 1937**.]

Company—Winding up—Misfeasance—Remuneration paid to director—Invalid resolution—Relief from liability—Fairly to be excused—Invalid appointment of director—Companies Act, 1929 (*c.* 23), *s.* 372.

L. F. owned the greater part of the shares of J. F. & Son, Ltd. His wife was appointed director in his lifetime, and also in his lifetime one C. C. was appointed a director. The latter never took up his qualification shares, and, although he continued to act and was treated as a director, he in law ceased to be such in 1933. L. F. died in 1934, and his wife, being in bad health, then went to the South of France, it being expected that her stay there would be a temporary one, but in fact she never returned. The directors at their meeting in the autumn of 1934 proposed to recommend to the annual general meeting of the company that she should receive remuneration at the rate of £8 per week as from Feb. 10, 1934, and that proposal was accepted and confirmed at the annual general meeting. It appeared, however, that there was not a quorum at that meeting, and payments made under the resolution were sought to be recovered from L. F.'s wife and the two persons who voted at the meeting. It was contended that this was a proper case for relief under the Companies Act, 1929, s. 372, as the persons in question had acted honestly and reasonably, and ought fairly to be excused :—

Held : though the defect in the resolution was a mere technicality, the appointment of the director being invalid, this was not a case in which, in all the circumstances of the case, any of the parties ought fairly to be excused for the breach of trust in making the improper payments.

[EDITORIAL NOTE. If the only breach of trust here had been the defect in the resolution, it would appear that there would have been no difficulty in obtaining relief. The fact that one of the directors was not validly appointed was directly within the words of sect. 372, " including [the circumstances] connected with his appointment," and prevented relief from being given.

As to Relief in respect of Misfeasance, see HALSBURY, Hailsham Edn., Vol. 5, pp. 331, 332, para. 545 ; and for Cases, see DIGEST, Vol. 9, p. 511, Nos. 3343-3347.]

Misfeasance Summons by the liquidator of J. Franklin & Son, Ltd., under the Companies Act, 1929, s. 276, for a declaration that Bernard Franklin, Lily Franklin and Charles Colman Lyon were jointly and severally liable to contribute to the assets of the company £568 as compensation for misfeasance whilst directors of the company in paying, or allowing to be paid, to Lily Franklin, and, in the case of Lily Franklin, in receiving, sums purporting to be her remuneration as a director from Feb. 10, 1934, to June 24, 1935, on the ground that the payment of such remuneration was not duly authorised by or on behalf of the company.

The company, J. Franklin & Son, Ltd., was formed on Jan. 24, 1924, to take over the business of Leon Franklin, and had a share capital of 30,000 shares of £1 each, of which 25,000 shares were issued to Leon Franklin and his nominees. Bernard Franklin was one of the nominees. The subscribers to the memorandum, Leon Franklin and Edward Blinkhorn, took one share each. Edward Blinkhorn was a partner with the respondent Charles Colman Lyon in the firm of Edward Blinkhorn, Lyon & Co., who were the auditors of the company. On Jan. 21, 1924, Lily Franklin, the wife of Leon Franklin, was appointed a director of the company until the next annual general meeting, and she was re-elected as a director in subsequent years. Edward Blinkhorn died on Mar. 20, 1930, being still the owner of the one share he took as subscriber of the memorandum. Edward Blinkhorn's will was proved by the respondent C. C. Lyon, on May 14, 1930, and the death and probate were noted on the company's share register, but C. C. Lyon was never registered as the holder of the share of the deceased. On Mar. 1, 1933, Leon Franklin, Bernard Franklin and Lily Franklin, and C. C. Lyon (representing the auditors) were present at a board meeting, at which it was unanimously resolved that C. C. Lyon be appointed a director of the company. C. C. Lyon acted continuously, and was treated by the company, as a director. In fact he never qualified as a director, and under the articles of the company ceased to be a director on May 1, 1933. Leon Franklin died in the spring of 1934, and his widow in the autumn went to live in the South of France, it being thought that she would return within a reasonable time, when she was better in health. Two days after she left, a board meeting was held, at which B. Franklin and C. C. Lyon were present. At this meeting it was resolved to recommend to a general meeting that Lily Franklin be paid remuneration as a director at the rate of £8 per week as from Feb. 10, 1934. The adjourned annual general meeting of the company was held on Jan. 10, 1935. The only persons present were B. Franklin and C. C. Lyon and a Mr. S. J. Chubb, who was in attendance as a partner of C. C. Lyon in the firm who were the company's auditors. The recommendation of the directors above referred to was confirmed. The question, upon these facts, was whether C. C. Lyon was in fact a member of the company at the time of the last meeting, as the validity of the resolution and the payments made thereunder were dependent upon that.

The articles of the company, so far as they are relevant, provided as follows: The executor of a deceased shareholder might register himself as holder of the shares of the deceased; but no person entitled by transmission should attend or vote at meetings of the company. The quorum for a meeting was two members holding or representing by proxy not less than one tenth part of the issued share capital of the company. The directors were to acquire their qualification shares within two months of appointment. The qualification of a director should be the holding in his own right alone and not jointly with any other person, of shares to the nominal value of £100. The director's office should be vacated upon failure to acquire his qualification.

The respondents contended that the payments in question were properly made, and, in the alternative, claimed to be relieved under the provisions of the Companies Act, 1929, s. 372, which provides as follows:

> (1) If in any proceeding for negligence, default, breach of duty, or breach of trust against a person to whom this section applies it appears to the court hearing the case that that person is or may be liable in respect of the negligence, default, breach of duty or breach of trust, but that he has acted honestly and reasonably, and that, having regard to all the circumstances of the case, including those connected with his appointment, he ought fairly to be excused for the negligence, default, breach of duty or breach of trust, that court may relieve him, either wholly or partly, from his liability on such terms as the court may think fit.

H. A. H. Christie, K.C., and *P. J. Sykes* for the applicant.
H. J. Wallington, K.C., and *Richmount* for the respondent, C. C. Lyon.
I. H. Jacob for the other respondents.

Crossman, J.: The respondents contend, first, that the payments were properly made, and, secondly, that, if they were not properly made, the respondents ought to be relieved from liability in respect of the breach of trust which the making of these payments involved under the Companies Act, 1929, s. 372. On the first point, the applicant says that no business could be transacted at the meeting held on Jan. 10, 1935, there being present only Mr. Bernard Franklin and Mr. C. C. Lyon which latter was not, in fact, at that time a member. He further says that the resolution which purported to be passed on that occasion was not valid, and that the payments made pursuant to the resolution were not properly made. This question, in my judgment, entirely depends upon whether Mr. C. C. Lyon was, in fact, a member. Mr. C. C. Lyon was entitled to be registered, because he was the executor of a shareholder, but, in my judgment, he was never himself registered as the holder of A the one share of which his testator had been the registered holder, and he was not a member. Therefore, there were not two members present personally at the meeting of Jan. 10, 1935, and the resolution which was passed then was not, in my judgment, validly passed. As the remuneration of a director could be given only by a vote of a general meeting, B the resolution was invalid, and the payments made pursuant thereto were also invalid. That being the case, *prima facie*, the two directors who authorised the payment pursuant to the resolution, and the third director who actually received the sums which were paid pursuant to the resolution, are, in my judgment, liable to refund these sums to the company C as sums improperly paid out of the funds of the company.

The second point which arises is whether I ought, under the Companies Act, 1929, s. 372, to relieve them of their liability, in the circumstances, on the grounds which are there set out. The respondent, Lily Franklin, has received and retained the payments, and she has not come forward D to give any evidence. All that I know is that these payments were wrongly made to her. It is true that it was partly owing to a technicality, or a technical defect, that the payments were improperly made, and, if that technical defect had not existed, it might have been extremely difficult for anyone to attack these payments; but, in my judgment, E the payments were improper, and they were not justified. I feel that I cannot, in the circumstances, hold under sect. 372 that this lady, having improperly received sums from the company, ought fairly to be excused from receiving money which did not belong to her, and which she ought never to have had at all, and be allowed to retain that money. F The section provides that three things have to occur in order to enable me to exercise the power of relief which is given by the section. First of all, the director must have acted honestly; secondly, he must have acted reasonably; and thirdly, having regard to all the circumstances of the case, including those connected with his appointment, he ought G fairly to be excused for what, in this particular case, is a breach of trust. If those three things occur, then the court has power to relieve him, either wholly or partly, from his liability, on such terms as the court may think fit. In the circumstances, I do not think that I should be justified in giving, or that I ought to give, any relief to Lily Franklin in H respect of the liability which she is under to repay the money which she has had.

Now, what is the position with regard to the other two persons? Ought they to be excused under that section? I understand that it is not contended by the applicant that either of them acted dishonestly in the sense in which the word "dishonestly" is used in the section. I read the word "dishonestly" in the section as meaning without any direct motive. If they had done this in order to assist Mrs. Franklin recklessly, but without considering the interests of the company at all, I think that they might well be said to be dishonest, but I do not find that the evidence goes to that. Then the second question is: Did they act reasonably? I think that it may have been reasonable for those two directors to have arrived at the conclusion, or to have believed, that Mr. Lyon was a member of the company, and that, therefore, the resolution was properly passed. If the resolution was properly passed, they were justified in paying, and, if there was nothing more in the case, and it was a purely technical defect in a perfectly proper transaction, I think that I could come to the conclusion, not only that the parties had acted honestly and reasonably, but also that, having regard to all the circumstances, they ought fairly to be excused, but I am bound, having regard to the section, to consider the third thing, namely, whether, having regard to all the circumstances of the case, including those connected with their appointment, the directors ought fairly to be excused? I do not want to go in detail into the evidence here, but I have listened for some days to arguments in this case, and I have heard the evidence very carefully. I cannot come to the conclusion that this is a case where, having regard to all the circumstances, either of these parties ought fairly to be excused. I have done my best to see if I could arrive at some conclusion which would excuse them from some part, but I cannot. With the best will in the world, I cannot see my way to say that they ought to be excused within the meaning of this section for this default of theirs, or this breach of trust of theirs. It is true that the defect in the resolution was a technicality, but it seems to me that, having regard to all the circumstances in this case, I am not justified in saying that they ought to be excused, any more than ought Mrs. Franklin, for the default for which they are liable under the earlier section.

Declaration that the respondents are jointly and severally liable to contribute to the assets of the company the sums paid to the respondent Lily Franklin.

Solicitors: *R. G. Percival* (for the liquidator); *William Charles Crocker* (for the respondent, C. C. Lyon); *Jacques, Asquith and Jacques* (for the other respondents).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

HUBBARD *v.* MESSENGER.

Distinguished. Blenkin *v.* Bell. [1952] 1 All E.R. 1258.

[King's Bench Division (Lord Hewart, L.C.J., du Parcq and Atkinson, JJ.), **October 13, 1937.**]

Road Traffic—Goods vehicles—Utility car—Whether subject to speed limit—Road Traffic Act, 1934 (*c.* 50), *s.* 2, *Sched. I.*

The respondent was charged with having unlawfully driven a Ford A
utility car, fitted with pneumatic tyres and constructed or adapted for
the conveyance of goods or burden, on a public highway at a speed greater
than 30 miles per hour (being the speed specified in the Road Traffic
Act, 1934, Sched. I, as the maximum speed for such a vehicle), contrary
to sect. 2 of that Act. The justices dismissed the charge, holding
that the vehicle was a car and not a van, that it had not been proved
that the vehicle was a goods vehicle within the meaning of the schedule, B
and that the vehicle was constructed solely for the carriage of passengers
and their effects. The justices were also of opinion that the act of lifting
out the rear seat of the vehicle was not an adaptation of the vehicle for
use for the conveyance of goods, and that it had not been proved that
the sides of the vehicle had been boarded up for the purpose of facilitating
the conveyance of goods:—

Held: although the vehicle was also designed to carry, not solely C
but in part, passengers and their effects, it was nevertheless a vehicle
constructed or adapted for use for the conveyance of goods or burden
within the meaning of the section of the Act of 1934, and the offence
charged was therefore proved.

[EDITORIAL NOTE. The question here is whether a "utility car" is a passenger
vehicle or a goods vehicle. It will be noted that the statute requires a passenger D
vehicle to be adapted *solely* for the carriage of passengers; but a goods vehicle
is not one adapted *solely* for the carriage of goods; and a vehicle that may be used
for either of these purposes or both is, for the purposes of the Act, a goods vehicle.

For the Law on the point see Halsbury Supp. to Vol. 27, para. 682; and
for Cases, see DIGEST, Supp. to Vol. 27, No. 232 *n.*

Appeal by way of case stated from a decision of justices for the county E
of Essex. The facts and the arguments are set out in the judgments.

George Pollock for the appellant.

Gilbert Beyfus, K.C., and *H. J. Baxter* for the respondent.

Lord Hewart, L.C.J.: An information was preferred by the F
apellant against the respondent, charging him with unlawfully driving
a certain Ford utility van, fitted with pneumatic tyres and constructed
or adapted for the conveyance of goods or burden, on a certain public
highway at a speed greater than 30 miles an hour contrary to the Road
Traffic Act, 1934, s. 2. The justices dismissed the information, and the G
question raised by this case is whether, in coming to that conclusion,
they erred in point of law. In my opinion, they erred in point of law
in two ways. First of all, it seems to me to be plain that they misconstrued
the Road Traffic Act, 1934, Sched. I, and, secondly, it seems
to me that, upon the evidence which was before them, there was really H
no evidence except for the purpose of a paradox or a jest which would
entitle them to arrive at the conclusion which they have very clearly
expressed.

First of all, what were the facts as found? They were that the engine
and chassis of the vehicle referred to were similar to those used in

passenger saloon motor cars, and they were not similar to those used in Ford vans and lorries. But what about the body ?

> Instead of a saloon body the vehicle was fitted with a body constructed of wood having a roof over it and with side-curtains of celluloid fitted at the sides and rear of the car. . . . The body was provided with seats as follows : in the forward portion of the body a seat large enough to accommodate the driver and two other persons ; behind this were two other single seats, and behind those a rear seat large enough to accommodate three persons. The construction of this rear seat was such that the whole of the seat could easily be lifted out of the said vehicle so as to leave a large vacant area on the floor of the vehicle. This vacant area could be used for the carriage of luggage or other goods or burden. No form of unscrewing or winding is necessary to remove the seat. At the back of the vehicle was a tail-board supported by drop-chains and capable of being lowered to the same level as the floor of the body in order to facilitate loading or unloading.

On the day on which the offence was said to have been committed, the rear seat in fact had been removed, and the sides of the body rearward of the two single seats had been boarded up to the roof with three-ply wood, in other words, had been boarded up so as to make that part of the structure resemble a van. On the floor behind the two single seats were two hampers of flowers, a large bunch of flowers, a flower-pot, a crate of trussed chickens, a box of eggs, and a suit-case. There was one passenger being carried.

Now, what is the law relating to this alleged offence ? By the Road Traffic Act, 1934, Sched. I, which is dealing with limits of speed, all vehicles are divided into three classes : (i) passenger vehicles ; (ii) goods vehicles ; (iii) locomotives and motor-tractors. Nobody, I imagine, even for the sake of argument, would dream of suggesting that the vehicle here referred to was a locomotive or motor-tractor. Unless, therefore, it represents a *casus omissus* in this schedule, it falls either within the class of passenger vehicles or within the class of goods vehicles. The information, to the terms of which we have very properly been referred, evidently alleged that the vehicle was in truth and in fact within the class of goods vehicles, that is to say, within the class of vehicles constructed or adapted for use for the conveyance of goods or burden of any description. What was the contrary contention ? The contrary contention was that it was not a goods vehicle, but a passenger vehicle. It was not indeed contended that it was not a vehicle at all, but the contention manifestly was that it was a passenger vehicle, and had not been shown to be a goods vehicle. I cannot help thinking that, in looking at this two-fold classification of passenger vehicles and goods vehicles, the justices paid too little attention to the fact that in the definition of passenger vehicles there is used the word " solely," while in the definition of goods vehicles that word " solely " is significantly absent. Passenger vehicles are vehicles constructed solely for the carriage of passengers and their effects. Goods vehicles, on the other hand, are vehicles constructed or adapted for use for the conveyance of goods or burden of any description ; and if they are constructed or adapted for use for the conveyance of goods or burden of any description it matters not that they are not solely constructed or adapted for that use. It

BIBL. LONDIN UNIV.

matters not that they may also be fitted to carry passengers. There can be no doubt, after the decisions to which our attention has been directed, that those words "constructed or adapted" mean what one would naturally expect them to mean. They are both past participles, and the words mean "originally constructed," or, notwithstanding the original construction, subsequently adapted, for use for the conveyance A of goods or burden of any description. What is said here on the part of the prosecution is that this particular vehicle was originally constructed for use for the conveyance of goods or burden side by side with its use for the conveyance or carriage of passengers. How is a tribunal to decide what is the use for which a particular vehicle is constructed? B If the ingenuity of the designer is such as to devise a mode of construction which renders the vehicle from time to time easily adaptable for a particular use, then it is right to say that the vehicle is constructed for that use. Where are the tribunal to look for their terms? First of all, they look at the vehicle itself. We have not had the advantage of seeing C the vehicle, but here are three illustrations of it. First of all, we have a side-view of the elevation of the vehicle; then we have a side-view of the rear part with the doors open. Would any man say, when he looked at that vehicle, that it was a vehicle designed and constructed solely for the carriage of passengers and their effects? It would look a very odd D thing, whether he saw it open or closed, and especially when he saw it with the tail-board down, the back part cleared and the drop-chains doing their work; secondly, he might look to see what the skilled constructor himself had said about the construction. No doubt advertising-leaflets or folders are capable of exaggeration, and not truly and com- E pletely to be accepted, but, when the question is what is the construction, why are we to be sceptical about the account given by the constructor himself, especially when it so plainly tallies with the numerous illustrations given of the vehicle, and especially when he is describing, not something ancillary to, or accidental or trivial in relation to, the whole, but the F very essence of this vehicle as distinguishing it from other vehicles on the road or in the market.

What is it that the constructor has to say about it? He has said that the centre seats can be removed if desired; the rear seat may be removed, leaving the spacious rear compartment free. Then he says: G

> The ease with which the Ford utility car can be converted to meet many requirements, its fine performance and riding comfort, and attractive appearance, make it invaluable not only for shooting-parties, but for a score of other duties on the country estate. It is many vehicles in one.

In other words, it is deliberately put upon the market as a composite H vehicle, designed like the piece of furniture in the verse, with a double debt to pay. The constructor goes on to say it can be used:

> for station work, and all the other utility transport needs of a country house.

After a picture with the tail-board down, he says:

> The tail-board is fitted with a compensating spring which makes it easy to handle.

It may be lowered flush with the floor to facilitate loading, and is supported by strong covered drop-chains, providing extra space for a load when wanted.

Speaking for myself, I cannot imagine in what clearer way the constructor or designer of this vehicle could have expressed its composite construction, its construction for two quite different uses. If that is so,
A what becomes of the words to which, in the argument for the respondents in the court below, the attention of the justices was never directed, "vehicles constructed solely for the carriage of passengers and their effects"? Having looked at the vehicle and examined it, having considered what the designer (whose substantial veracity there is no reason
B to doubt) has to say about it, the justices might fairly look—but of course this particular matter would not in itself be conclusive—at the use to which the vehicle was in fact being put. We are told that the rear seat had been removed, that the body had been boarded up to the roof with wood, and that on the floor there were two hampers of flowers, a
C large bunch of flowers, a flower pot, a crate of trussed chickens, a box of eggs, and a suit-case. Manifestly the vehicle was exhibiting its utility for some, at least, of the utility transport needs of a country house. Part of the argument, not only in the court below but also here, has appeared to be that the vehicle cannot be taken out of the category of
D passenger vehicles merely by the fact that it is used, or is constructed so as to be used, for the conveyance of goods or burden. Be it so. The mere fact that, on a particular occasion, a vehicle was being used for the conveyance of goods or burden which no human ingenuity could represent as passengers' luggage or passengers' effects would not be in
E the least degree conclusive if the other requirements were satisfied. But, when it is said that the true view of this vehicle is that it was a passenger vehicle, the justices find themselves, or ought to find themselves, immediately face to face with the definition, "vehicles constructed solely for the carriage of passengers and their effects." To hold that this vehicle
F was so constructed, except, as I say, as a matter of paradox, or a matter of humour, in spite of its appearance, in spite of all we hear about it from all the most authoritative persons, and in spite of the user, seems to me to be highly unjudicial. In my opinion, it is apparent that the justices misconstrued these definitions, and drew from the evidence
G before them an inference they could not reasonably draw. To put the thing in the mildest way, this vehicle really represents a colourable attempt to get the benefit of the higher speed for a vehicle ingeniously constructed to be a goods vehicle. It matters not whether it was at the same time contrived to be a vehicle not solely but in part for the
H carriage of passengers. It is, indeed, many vehicles in one, but, as it is many vehicles in one, it does not fit into the first part of Sched. I of the Act of 1934, and cannot be said to be constructed solely for the carriage of passengers.

I think, therefore, that the justices made a twofold error in point of law, that this appeal ought to be allowed, and that the case ought to go back to the justices, with a direction to find that the offence which was charged was proved.

du Parcq, J.: I agree. The Road Traffic Act, 1930, s. 10, is in these words:

> It shall not be lawful for any person to drive a motor vehicle of any class or **A**
> description on a road at a speed greater than the speed specified in Sched. I to this Act as the maximum speed in relation to a vehicle of that class or description, and if any person acts in contravention of this section he shall be guilty of an offence.

By the Road Traffic Act, 1934, there has been substituted for Sched. I of the Act of 1930 Sched. I of the Act of 1934. It is, I think, plain that the legislature intended Sched. I of the Act of 1934 to be exhaustive. **B**
By sect. 10 the legislature makes provision for every motor vehicle. The words are: "a motor vehicle of any class or description." The offence in each case is to drive a motor vehicle at a speed greater than the speed specified. It follows that, for every motor vehicle, there must be in the schedule, unless the legislature has wholly failed to carry out **C**
its intention, a specified speed. We ought to approach this Act on the assumption that the legislature has not failed to carry out that intention, though, of course, one might be compelled to come to the regrettable conclusion that that assumption was wrong. In my view, it is plain that the legislature has done what was intended, and has provided a **D**
schedule which does specify a speed for every motor vehicle.

Every motor vehicle is intended, I suppose, either to carry passengers or to carry goods, or to carry both passengers and goods. If one were told, without further help, merely to distinguish between goods vehicles and passenger vehicles, obvious difficulties might arise, but, in this case, **E**
when one looks at Sched. I, one finds a definition of passenger vehicles, that is to say, "vehicles constructed solely for the carriage of passengers and their effects." It was impossible to approach this case, if a proper result were to be arrived at, without appreciating the importance of that definition in the first clause of Sched. I, and I agree respectfully **F**
with Lord Hewart, L.C.J., that the magistrates fell into the error of trying to decide this case without giving full weight to those words.

It is said by Mr. Beyfus that, although this court might not have taken the same view as did the magistrates, and although the magistrates might have taken another view, we must respect the finding of fact: **G**
and he is, of course, right in saying that it is not for this court to disturb what is really a finding of fact based upon evidence. But, while I entirely agree with him, as I am bound to, when he says that, it is a mistake to suppose that, where facts are found or conceded—many of the facts in this case are not in dispute—and then, from those facts, the **H**
magistrates draw an inference which it is impossible to maintain, they can, by calling it a finding of fact, place themselves outside the jurisdiction of this court.

I need not refer further to the facts; they are plain enough. Much light is thrown upon this case by the advertisement which was before

the magistrates. Of course, no one would attach importance to a mere puff. A statement that a motor vehicle is capable of this or that performance is no evidence against anybody other than the maker of it, who made the assertion, and who is charged, but the importance of this leaflet is that it is a statement of fact which was not in dispute. Nobody
A suggests that these pictures of the vehicle in question are not accurate pictures, nobody suggests that the account of the dimensions is not an accurate account of the dimensions, and, when that is once granted, it is perfectly plain that the expressions relied upon here on behalf of the appellant are not mere advertisement, not a mere puff, but perfectly
B matter-of-fact statements of something which is obvious to any person who either looks at the vehicle itself or looks at and understands the drawings of the vehicle.

The result is that the magistrates in this case have found facts which show that it is, as Lord Hewart, L.C.J., has said, paradoxical, having
C stated them, to draw the conclusion that the vehicle was "constructed solely for the carriage of passengers and their effects." And if once it is seen that that cannot be maintained, and that the case itself shows that this vehicle was constructed for purposes other than the carriage of passengers and their effects, that is to say, for the purpose of carrying
D goods other than the effects of passengers, it is plain that this vehicle, as it does not come within the first part of this exhaustive Schedule, must come within either the second or third part. If, as Lord Hewart, L.C.J., has said, nobody suggests, or could suggest, it comes within the third part of it, then it follows, and is to my mind clear to
E demonstration upon this case itself, that it must be a goods vehicle, so that the charge was made out. For these reasons, I agree with what Lord Hewart, L.C.J., has said, and with the judgment proposed.

Atkinson, J.: I have had considerable doubt, during the argument
F of the case, as to the conclusion at which the court should arrive, but in the end I have come to a clear view, and I agree with what my brothers have said. The respondent was charged with driving a vehicle, which came within the definition of a goods vehicle in the Road Traffic Act, 1934, Sched. I, at a speed greater than 30 m.p.h. If that definition
G had stood alone, I think I should have come to the conclusion that it meant a vehicle constructed or adapted for use, mainly or in substance, for the conveyance of goods or burden of any description. If that were a true definition, I do not think that this vehicle would come within it, but it does not stand alone. There is the definition of passenger
H vehicles, where passenger vehicles are restricted to vehicles constructed solely for the carriage of passengers and their effects. I am quite sure that Parliament must have intended these two definitions to cover all the ground. They can cover all the ground only if there is put upon the definition of goods vehicles an interpretation wider than that which I was at first inclined to give it. In view of the definition of passenger

vehicle, and in view of my conviction that Parliament must have intended to cover all the ground, I do not think I am entitled to read into the definition words such as "mainly," or "in substance," or anything of that kind, but I must take the words that are there. Interpreting it in that way, I think it means vehicles constructed or adapted for use, among other purposes, for the conveyance of goods, that, if one of the objects of the construction is the conveyance of goods other than passenger effects, then the vehicle comes within that definition. Being driven to that view, I cannot see how it can be said that this vehicle was not constructed partly for the carriage of passengers and their effects, and partly, at least, for the carriage of goods other than passenger effects. If that be so, it comes within what I think must be the proper interpretation of the definition of goods vehicles. Therefore the magistrates, in my view, ought to have convicted.

Appeal allowed with costs, and case remitted to justices with a direction to find that the offence charged was proved.

Solicitors: *Corbin, Greener & Cook*, agents for *Thompson, Smith & Puxon*, Colchester (for the appellant); *Lovell, White & King* (for the respondent).

[*Reported by* Michael Marcus, Esq., *Barrister-at-Law.*]

DE CHOISY *v.* HYNES.

[Chancery Division (Bennett, J.), **October 15, 1937.**]

Bankruptcy—Undischarged bankrupt—Obtaining credit to the extent of £10 *or upwards without disclosure—Sale of land and business—Purchase price payable by instalments—Bankruptcy Act,* 1914 (c. 59), s. 155.

Sale of Land—Purchaser undischarged bankrupt—Purchase price payable by instalments—Whether disclosure necessary.

The plaintiffs entered into a contract with the defendant for the sale to him of the whole issued share capital of a private company and of certain freehold premises. The contract provided that the purchase price or any unpaid part thereof should carry interest at 2½ per cent. per annum from the date of completion and should be payable by weekly instalments of principal and interest of not less than £3, and if any such instalment should be in arrear for fourteen days the unpaid balance of the purchase money should become immediately payable and should be secured by a legal charge upon the freehold property. The plaintiffs asked for rescission of the contract by reason of the fact that the purchaser concealed from them until after the execution of the contract the fact that he was an undischarged bankrupt:—

Held: the entering into a contract in this form by an undischarged bankrupt is an obtaining of credit within the Bankruptcy Act, 1914, s. 155, and a contract so entered into by an undischarged bankrupt without disclosure of the fact that he is an undischarged bankrupt is unenforceable by him. The plaintiffs were, therefore, entitled to an order for rescission of the contract and costs of the action.

[**EDITORIAL NOTE.** Cases upon the Bankruptcy Act, 1914, s. 155, have usually concerned sales of goods, and this is the first case dealing with a transaction where, in the ordinary way, a sale of property is preceded by a formal contract regulating the terms of the sale. It will be noted that the purchase price is payable by instalments. There will apparently be no difficulty if the purchase price is payable in full upon completion, unless the vendor is taking a mortgage for the whole or part of the purchase price. Where a third party, e.g., a building society, is providing the purchase price, it would not seem that the purchaser is obtaining credit from the vendor, and it would seem sufficient that there should be disclosure to the mortgagee, and that in any event the vendor could not in those circumstances rescind the contract, or contend that it is unenforceable. Where the vendor receives the purchase price by instalments, but the contract provides for the execution of the conveyance upon the payment of the last instalment, it would not seem that there is any obtaining of credit or any need for disclosure, and this would appear to be so even though the purchaser is let into possession.

As to Obtaining Credit by Undischarged Bankrupt, see HALSBURY, Hailsham Edn., Vol. 2, pp. 463, 464, para. 634; and for Cases, see DIGEST, Vol. 5, pp. 1052, 1053, Nos. 8585-8593.]

Action for the rescission of a contract of sale of freehold property and shares in a private company, and counterclaim for specific performance of the same contract. The facts are fully stated in the judgment.

G. P. Slade for the plaintiffs.

B. M. Cloutman for the defendant.

Bennett, J.: This is an action in which Mr. and Mrs. de Choisy are the plaintiffs, and the defendant is Mr. George Hynes. The plaintiffs ask for rescission of a contract entered into between them as vendors and the defendant as purchaser in Jan., 1935. The contract bears no date apart from the year, but the parties are agreed that it was on some day in Jan., 1935, that they made the contract which the plaintiffs ask to have rescinded. The defendant has put in a counterclaim by which he seeks to have a decree for specific performance of that contract.

The contract provides for the sale by the plaintiffs to the defendant of the whole of the issued share capital of the private limited company called the Golden Arrow Motor Works (Bedford), Ltd., the plaintiffs being, at the date of the contract, the holders of all the issued shares, which were 60 in number and which were of nominal value. The contract also provides for the sale by the plaintiffs to the defendant of certain freehold premises, No. 3, London Road, Bedford, to which the plaintiffs were jointly entitled in fee simple.

The facts and circumstances leading up to the making of the contract are these. The company carried on upon the freehold property, No. 3, London Road, Bedford, the business of dealing in motor cars, and in those things which are commonly sold for use in connection with motor cars. The two plaintiffs were the directors of the company. The defendant entered into the employment of the company at the beginning of the year 1933, as a salesman. He subsequently became the secretary and manager of the business of the company. It is common ground that he ceased to be the secretary of the company in or about Nov., 1933, and he continued to act as manager until the middle of Oct., 1936. For the purpose of enabling the company to carry on business and to obtain accommodation from its bankers, the Westminster Bank, Ltd., between Feb., 1934, and the end of Jan., 1935, three guarantees of the company's account with its bankers had been given to the bankers, one of Feb. 16, 1934, signed by the plaintiffs and the defendant, in which the amount guaranteed by each of the parties to the guarantee was not to exceed £100, the second dated July 13, 1934, signed by the plaintiffs only, the amount guaranteed being £500 in addition to the £100 guaranteed by the first guarantee, and the third, dated Jan. 15, 1935, signed by the plaintiffs alone, and guaranteeing the payment by the company of an additional sum of £900.

The agreement which the plaintiffs seek to have rescinded, and of which the defendant claims a decree for specific performance, provides for the sale by the plaintiffs to the defendant for the sum of £4,000, first of all, of the freehold land, workshops and buildings, No. 3, London Road, Bedford, and, secondly, of all the shares in the company known as the Golden Arrow Motor Works (Bedford), Ltd. Clause 2 of the contract provides :

> The purchase shall be deemed to have been completed as on July 31, 1934 (hereinafter called the day of completion) and shall be completed on the [blank] day of [blank] 1935, at the office of Messrs. Tebbs & Son the vendors' solicitors at 7 Harpur Place Bedford aforesaid. The purchase money with interest thereon or on the unpaid part thereof at the rate of £2 10*s.* per cent. per annum from the day of completion shall be payable by weekly instalments of principal and interest of not less than £3 the first of such instalments to be paid on the Monday next following the completion of the purchase and each subsequent instalment to be paid on Monday of each week following. Provided that the purchaser shall at any time be at liberty to pay the balance of the purchase money then remaining due, but if the purchaser shall make default in payment of any such instalments of principal or interest or any part thereof for 14 days after the same shall become due the whole of the unpaid balance of the said purchase money with interest thereon shall become immediately due and payable and the payment of the unpaid balance of purchase money and interest shall be secured on the said freehold property by a charge by way of legal mortgage to be prepared by the vendors at the expense of the purchaser and to contain such powers and provisions and to be in such form as the vendors shall reasonably require and to be executed immediately after the execution of the assurance of the premises.

There then follow, in cls. 3, 4, 5 and 6, provisions not material for the present purpose, relating to the vendors' title to the freehold property. Clause 7 provides as follows :

> During so long as any part of the said purchase price shall remain unpaid (hereinafter called the mortgage period) the purchaser shall procure that the company will sell to the vendors any goods or materials usually sold or dealt in by the company and to carry out at the vendors' request any work usually carried out or done by the company the vendors being allowed a deduction from the usual price or cost of such goods material or work such discounts as are usually allowed between one trader and another in the same class of business.
>
> (8) During a period of 10 years from the day of completion and if the mortgage period shall at the expiration of such 10 years be still subsisting then during the remainder of the mortgage period the purchaser will each year pay to the vendors such sum as shall be equal to one-fifth part of the net profit of the company available for distribution as dividend after allowing or deducting the yearly sum of £312 as management remuneration but without any other deduction or allowance in respect of directors' fees or remuneration. (9) The said Emmanuel Jean de Boyer de Choisy [the male plaintiff] will during the mortgage period guarantee the account of the company at the Westminster Bank, Ltd., Bedford, or such other bank as the company shall from time to time bank with to the amount not exceeding the sum of £1,500.

That sum is the sum in respect of which, by Jan. 15, 1935, he had, in conjunction with his wife, given a guarantee to the company's bankers.

No steps have yet been taken to complete that contract. The freehold property has not been conveyed by the plaintiffs to the defendant, nor have their shares been transferred by the plaintiffs to the defendant. But, from a date which I think is Jan. 28, 1935, up to some date in Oct., 1936, there was paid by the company to the plaintiffs, on account of the weekly instalments of £3 which had to be paid in discharge of the purchase money, £3 per week on an order given by the defendant to the company's bankers so to pay. In the interval which elapsed between Jan., 1935, and the date when the parties got at loggerheads with one another, two similar guarantees were given by the plaintiffs to the company's bankers on the company's overdraft, one of May 6, 1936, guaranteeing the sum of £1,000 in addition to the sum which had already been guaranteed, and the other on Oct. 12, 1936, by which the plaintiffs guaranteed the overdraft of the company to the extent of a further sum of £700.

For reasons which it is not material to consider, the parties fell out in Oct., 1936, and since that date no sums on account of the weekly payments of £3 per week have been made to the plaintiffs. At the time when the contract was made the defendant was an undischarged bankrupt; he had been adjudicated a bankrupt in 1926, he has made no application for his discharge, and he was, and still is, an undischarged bankrupt. The first ground upon which the plaintiffs ask that the contract shall be rescinded is that the defendant concealed from them the fact that he was an undischarged bankrupt. The first point to be decided is whether in fact the defendant, as he alleges, did tell the plaintiffs that he was an undischarged bankrupt, or whether, as the plaintiffs say, he never at any time disclosed to them that fact. I have no doubt whatever what is the truth about this matter. I am satisfied that the defendant did not disclose to the plaintiffs or either of them at any time the fact that he was an undischarged bankrupt. I am satisfied that the first time they knew of the fact that the defendant was an undischarged bankrupt was shortly after Nov. 2, 1936, when they were informed by their solicitors of the result of the search they had made. I reject the defendant's evidence in regard to the interview which he says took place at the end of, or during, Nov., 1933, and I do not believe that he then made to them the disclosure which he says he did.

On that basis of fact, how does the law stand? The Bankruptcy Act, 1914, s. 155, provides that:

> Where an undischarged bankrupt (*a*) either alone or jointly with any other person obtains credit to the extent of £10 or upwards from any person without informing that person that he is an undischarged bankrupt . . . he shall be guilty of a misdemeanour.

The contract which the plaintiffs seek to have rescinded, and in respect of which the defendant asks for a decree of specific performance, is a contract by which the plaintiffs have agreed to give the defendant credit for a sum in excess of £10. He gets credit under this contract which he executed for the sum of £4,000 and interest. In my judgment, where there is obtained by a person who is an undischarged bankrupt a contract by which he becomes entitled to get, from the person with whom he has entered into the contract, credit to the extent of £10 or upwards, without disclosing the fact that he is an undischarged bankrupt, that con- A tract is unenforceable by the undischarged bankrupt. The undischarged bankrupt has failed to perform the duty which the section plainly imposes upon him, and, in those circumstances, it is impossible, in my opinion, for such a contract to be enforced.

In the result, on the finding of fact and in view of the provision of B the statute, my judgment is that the plaintiffs are entitled to the order for which they ask, namely, an order for rescission of the contract in question, and to an order for the payment by the defendant to them of the costs of the action.

The counterclaim must be dismissed with costs. C

Order for rescission of contract. Defendant to pay plaintiffs' costs. Counterclaim dismissed with costs.

Solicitors: *Crossman, Block & Co.*, agents for *Tebbs & Son*, Bedford (for the plaintiffs); *Wedlake, Letts & Birds*, agents for *Alexander Farr & Son*, Bedford (for the defendant). D

[*Reported by* Reginald Townsend, Esq., *Barrister-at-Law.*]

FINDLAY *v.* NEWMAN, HENDER & CO., LTD. E

[King's Bench Division (Lord Hewart, L.C.J., du Parcq and Atkinson, JJ.), **October 13, 1937.**]

Factories and Shops—Dangerous machinery—Fencing—Unfenced mill gearing—Absolute duty to fence—Injury to workman—Factory and Workshop Act, 1901 (*c.* 22), *s.* 10 (1) (*c*). F

The respondents were charged with having failed to have certain mill gearing in their factory securely fenced, or in such position or of such construction as to be equally safe to every person employed or working in their factory, in consequence of which one of their workmen was injured. The mill gearing consisted of a countershaft 12½ ft. from the ground to which a belt was attached, and the workman was injured in replacing the belt. The justices dismissed the charge, holding that the G said mill gearing need not be fenced, as it was as safe as it would be if fenced:—

Held: as the essential purpose of the Factory and Workshop Act, 1901, s. 10 (1) (*c*), is to provide absolute safety, so far as fencing can provide it, it was clear that the section had been contravened, and the offence charged was, therefore, proved. H

[EDITORIAL NOTE. The Factory Act, 1901, s. 10 (1) (*c*), in effect makes two provisions in respect of mill gearing. If the mill gearing is accessible to workmen carrying on their ordinary work, there is an absolute duty to fence it, and no question arises as to whether it is as safe as it would be if fenced. Where the mill gearing is in a wholly inaccessible position the duty to fence is not absolute, and in that case justices may consider the question whether it is not as safe unfenced as fenced.

Once there is evidence that the position of the gearing is such that persons working in the factory might in the ordinary course of their work come in contact with it, and such evidence is accepted by the court, it is improper for justices to consider whether it is as safe unfenced as it would be if fenced.

As to Fencing Dangerous Machinery, see HALSBURY, Hailsham Edn., Vol. 14, pp. 594, 595, para. 1130; and for Cases, see DIGEST, Vol. 24, pp. 908-911, A Nos. 65-81.]

Case referred to:

(1) *Atkinson* v. *London & North Eastern Ry. Co.*, [1926] 1 K.B. 313; Digest Supp.; 95 L.J.K.B. 266; 134 L.T. 217.

Appeal by way of case stated from a decision of the justices for the B county of Gloucester. The facts and the arguments are set out in the judgments.

Valentine Holmes for the appellant.

R. M. Montgomery, K.C., and *R. C. Hutton* for the respondents.

C Lord Hewart, L.C.J.: I am clearly of the opinion that this appeal must be allowed. Informations were laid against the present respondents for failing to keep their factory in conformity with the Factory and Workshop Acts, in the sense that:

> D certain mill gearing namely the shaft and belt which communicates power to the rumbler adjoining the core bench in the fettling shop of the said factory were not securely fenced on the said date contrary to the Factory and Workshop Act, 1901, s. 10.

The second information, framed with reference to sect. 136 of the Act, as the first information was framed with reference to sect. 135 of the E Act, alleged that, in consequence of the omission securely to fence, a workman had suffered bodily injury. The justices having heard those informations, the question arises for us whether, in so dismissing them, they came to a correct determination in point of law.

Now, the main facts of the case are perfectly obvious. The case finds F that there was in the fettling shop a countershaft 12½ ft. from the ground, mounted on brackets 2 ft. from the wall. A 3-in. belt in contact with that shaft carried a drive to a pulley, and the shaft itself was plain and smooth, 2½ ins. in diameter, and revolving at 190 revolutions per minute. Then the case goes on to find in terms that:

> G The said countershaft and belt were not fenced in any way and the said countershaft is mill gearing within the meaning of the Factory and Workshop Acts, 1901 to 1929.

The case goes on to find that there was a notice prohibiting the workmen from putting on belts between the main shaft and the countershaft H unless the engine was stopped or slowed down. Then the case finds that on Sept. 4, 1936, a workman employed in the factory helped another workman to replace a belt from the countershaft to another point. I will read the words of the case:

> The said Venn climbed on to a waterpipe running along the wall approximately 5 ft. 5 ins. below and parallel with the said countershaft which he could have touched from such position. The said Venn put the belt over the said countershaft which

> was in motion at the time and with which it became entangled. In endeavouring to protect his face from the loose end of the belt, the said Venn's left arm was caught and twisted around the said countershaft, thereby sustaining injuries which necessitated its amputation above the elbow.

Having set out those facts, the case goes on to state that the said countershaft and belt would be dangerous to anyone who came in contact with them while they were in motion. A

There is the case. Sect. 10 of the Act of 1901 sets out provisions as to safety, the neglect of which provisions, if there is neglect alone, may give rise to a prosecution under sect. 135, but, if there is not merely neglect, but a consequential injury, may give rise to a prosecution under sect. 136, both of which prosecutions were initiated here. It is provided B as follows:

> With respect to the fencing of machinery in a factory, the following provisions shall have effect. . . . (c) All dangerous parts of the machinery and every part of the mill gearing must either be securely fenced, or be in such position or of such construction as to be equally safe to every person employed or working in the factory as it would be if it were securely fenced. C

It is impossible to exaggerate the stringency of those words. For this purpose, the machinery which is being dealt with is divided into two classes, first of all, parts of the machinery which are said to be dangerous, and, secondly, mill gearing; but the section applies to every part of the mill gearing. If that which is being dealt with is part of the mill gearing, D the question whether it is a dangerous part of the machinery does not arise, and here the case begins by finding that the countershaft is mill gearing within the meaning of the Act. That being so, what was the duty imposed? That mill gearing must be securely fenced. Those words do not mean "must be a little securely fenced," or "must be E reasonably securely fenced," or "must be moderately securely fenced." They mean that they must be securely fenced, and the alternative is that they should be "in such position or of such construction as to be equally safe"—not "equally unsafe"—"to every person employed or working in the factory"—that is to say, either regular workmen or even F the casual person then working in the factory—"as it would be if it were securely fenced." It is quite clear to my mind when I read this case—and the inference is confirmed by the very careful argument which has been presented on the part of the respondents—that the respondents took the view, and persuaded the justices that the view was G correct, that the words "securely fenced" mean "rather securely fenced," and that the words "or be in such position or of such construction as to be equally safe" mean "no more unsafe," entirely ignoring the fact that the essential purpose of the section is to provide absolute safety, so far as fencing can provide it. On those facts, it was contended H on the part of the respondents, and contended with success, that the gearing in question was as safe unfenced as fenced, and the justices have so held, professing, in circumstances which I cannot in the least understand, to find some support for that view in the judgment which I delivered in the case of *Atkinson* v. *London & North Eastern Railway*

Co. (1). They have come to the conclusion, which they say is a conclusion of fact, that this particular belt drive need not be fenced, as it is as safe as it would be if it were fenced. Then they have exhibited their frame of mind by adding in para. 10 that they regarded the issue as essentially one of fact for them, and have stated the case only because A they were unwilling to refuse to state a case when they were asked. There is, of course, an obvious question of law, and the question of law is this, whether, upon these materials, there was any evidence upon which a reasonable tribunal could come to the conclusion that the section had not been contravened. Here is mill gearing, a shaft revolving at B 190 revolutions a minute, accessible to persons who, for example, wish to replace the belt, not in any sense whatever fenced, and these justices have permitted themselves to accept the contention put before them, that that mill gearing was in such position and of such construction as to be equally safe either fenced or unfenced. It is difficult to understand C either how such a contention could be made or how such a contention could be accepted. It appears to me to be manifestly at variance with the most obvious facts, and I can only suppose that these justices were led to take a completely wrong view of this section, namely, that some respectable degree of safety had alone to be provided, and that it was D quite enough for them if they were satisfied that that countershaft in that place was no more unsafe without a fence than it would be with a fence; *scilicet* because, if it had been fenced, and a man had wanted to replace the belt, if the fence had been of a particular kind, he might have had to take the fence off the countershaft. It is really deplorable E that such a conclusion as that to which these justices have come could possibly be arrived at by them. It was vaguely suggested on the part of the respondents that the justices had struck too soon, and that the respondents, if they were given an opportunity, might conceivably have been able to offer evidence in support of the proposition which the justices F have found to be established, and, when a question is asked as to the pith and purpose of this suggested evidence, the answer is that evidence might have been offered to show that fencing would make this particular shaft more dangerous still, a remarkable defence, which, if fully established, would, of course, have the result of merely imposing upon the G employers the obligation of scrapping the machinery.

It would be idle to remit this case to the justices. In my opinion, the appeal must be allowed, and the case must go back to the justices with the direction to find that the offence which was charged was proved.

H DU PARCQ, J.: I am of the same opinion. The justices had two questions to consider. First, was it proved under sect. 135 that this factory was not kept in conformity with the Act, that is to say, in this case, with sect. 10 (1) (*c*) of the Act? Secondly, had a person suffered a bodily injury in consequence of the respondents having neglected to observe any provision of the Act, that is to say, the provisions of sect. 10 (1) (*c*) ? The magistrates, having heard the case for the prosecution, tell this court that they find as a fact that this particular belt drive need not be fenced, and they give this reason, " as it is as safe as it would be if fenced." They say, therefore, that they hold that the case was not proved under either of the informations. Now, it seems to me that that finding is susceptible of two interpretations. It may mean that the magistrates thought that this belt drive could not be made safe by fencing at all, that it could not be securely fenced, so that, whatever its position, it was just as safe—if the expression may be used, and I agree it is a faulty one—as it would be if some attempt, necessarily imperfect, had been made to fence it securely. If that is what the magistrates mean, it shows a complete misunderstanding of that section, although they have been assisted to understand it, as Lord Hewart, L.C.J., has said, by many judgments of this court. It means —and I rather gather, from the reply of counsel for the respondents to a question put to him, that this may really be what at any rate the respondents invited the magistrates to say—that the terms of the section cannot be complied with, because Mr. Montgomery said evidence might have been called by the respondents to show that any fencing would have been inadequate, so that it was just as well to leave this unfenced. As Lord Hewart, L.C.J., has said, the only result of that evidence and of that contention, if the justices had appreciated the position, would have been that this mill gearing would have had to have been scrapped altogether, because the terms of the section are not that mill gearing must be fenced as securely as it can be fenced, but that it must be securely fenced. It would be plain, if that is the interpretation to be put on the magistrates' purported finding of fact, that they were merely making a pronouncement upon the law, which in itself is unsatisfactory, and which, in the light of the decisions of this court, is wholly untenable. I think the other possible meaning of their finding is that they thought that, even without fencing, this mill gearing was not dangerous, and they could think that, it seems to me, only if they were persuaded, or persuaded themselves, that it could not be foreseen that anybody working in the factory could be injured by it. On the facts as they have found them, that view seems to be quite a hopeless one when the law is understood. The magistrates may possibly have thought that it was negligence ; they may have thought that it was serious negligence and disobedience to orders by the man who was injured. But, even if that be so, if the occupier of the factory could have foreseen that workmen would do what this workman did, or if any reasonable person could have foreseen such a thing's happening, it is impossible to say that the machinery was safe. Here the injury was undoubtedly suffered ; it was suffered by a man doing something which, clearly, from the finding that there had been a notice warning the workmen, the employers had understood might happen. The proper way to safeguard employees is not by putting up notices, is not by saying " Do not touch," or "Keep clear," or "Keep away," but by so fencing or by so constructing your machinery that the dangerous part ceases to be anything but secure, and, if magistrates or employers think that the machinery is as safe unfenced as it would be if it were securely fenced merely because a notice is put up warning employees to be careful, they have entirely misunderstood the many decisions of this court, and also those of the Court of Appeal. I agree that this case ought to go back to the magistrates with a direction to convict.

ATKINSON, J.: I agree. The case, I think, can be put in a nutshell, at any rate in the third judgment. This countershaft was mill gearing; there was, therefore, an absolute obligation to have it securely fenced unless for every person employed in the factory it was equally safe unfenced as it would have been if securely fenced. There is a very important finding of fact that the countershaft and belt were dangerous. That is in para. 5 (*f*). In view of that finding, the ultimate finding that the countershaft was as safe unfenced as it would be if fenced can mean only that it is no more dangerous than it would have been if fenced, and that is no answer. That is not enough to discharge the obligation of having this countershaft securely fenced. If it is said that these words must be given their grammatical meaning, that the magistrates did intend to find that it was as safe as it would have been if fenced, then there was not a particle of evidence to justify such a finding, and such a finding, giving a literal meaning to the words, would be in direct conflict with their own finding of fact that the countershaft was in fact dangerous. To my mind, there was no answer whatever in this case to the allegation that the obligation securely to fence had not been discharged. In view, I repeat, of the finding that the countershaft was in fact dangerous, I see no room for the intervention of the two alternatives.

Appeal allowed with costs, and case remitted back to the justices with directions to convict and to impose a penalty.

Solicitors: *Treasury Solicitor* (for the appellant); *Gibson & Weldon*, agents for *Wellington & Clifford*, Stroud, Gloucestershire (for the respondents).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

Re WINTERSTOKE'S WILL TRUSTS, GUNN *v.* RICHARDSON.

[CHANCERY DIVISION (Clauson, J.), **October 14, 1937.**]

Settlements—Tenant for life and remainderman—Apportionment—Securities sold after death of tenant for life—Dividends partly accrued due during lifetime of tenant for life—Payment of apportioned part out of purchase money to the estate of tenant for life.

A testator by his will settled his residuary estate upon trust to pay the income thereof to two ladies during their lives and subject thereto the residue was given to various ascertained persons in certain proportions. One of the tenants for life having died, in order to pay the death duties then payable, the trustees sold certain securities. At the time of the sale dividends were accruing, part of which had accrued in the lifetime of the deceased tenant for life. The dividends were subsequently received by the purchasers. The personal representatives contended that the rights of the tenant for life could not be affected by the trustees dealing with the shares before the dividends were paid and asked for an apportioned part of the dividends to be paid to them out of the purchase price. There was no difficulty in ascertaining the amount of the apportioned part of the dividends :— A

Held : the dividends ought to be so apportioned and the personal representatives of the tenant for life were entitled to receive the sum representing the proportion of the dividends which accrued up to the date of the death of the tenant for life on the securities so sold.

[EDITORIAL NOTE. It will be noted that in the present case there was no difficulty in ascertaining the apportioned part of the dividends ; and, presumably, B in the case of trustee investments, this will almost always be the case. It is doubtful how far the case can be applied to investments not producing a uniform income.

As to Apportionment as between Tenant for Life and Remainderman, see HALSBURY, Vol 25, Settlements, pp. 612-614, paras. 1079-1083 ; and for Cases, see DIGEST, Vol. 40, pp. 677-680, Nos. 2132-2157.]

C

Cases referred to :

(1) *Bulkeley* v. *Stephens*, [1896] 2 Ch. 241 ; 40 Digest 678, *2145* ; 65 L.J.Ch. 597 ; 74 L.T. 409.

(2) *Scholefield* v. *Redfern* (1863), 2 Drew. & Sm. 173 ; 40 Digest 678, *2143* ; 32 L.J.Ch. 627 ; 8 L.T. 487.

(3) *Freman* v. *Whitbread* (1865), L.R. 1 Eq. 266 ; 40 Digest 678, *2144* ; 35 L.J.Ch. 137 ; 13 L.T. 550. D

(4) *Re Sir Robert Peel's Settled Estates*, [1910] 1 Ch. 389 ; 40 Digest 679, *2151* ; 79 L.J.Ch. 233 ; 102 L.T. 67.

Adjourned Summons by the trustees of the will of the late Lord Winterstoke to determine in relation to certain securities which formed E part of the residuary estate of the testator and were sold " cum dividend " after Sept. 22, 1936 (being the date of the death of the tenant for life, Yda Emily Margaretha Richardson), whether : (*a*) the whole of the purchase price realised by such sales after deducting the costs of realisation falls to be treated as capital ; or (*b*) such purchase price falls to F be apportioned as between capital and income on the basis of appropriating to income the sum of £2,160 13*s.* 1*d.* or other the sum which represents the proportion of dividend accruing on the said securities respectively calculated down to Sept. 22, 1936 ; or (*c*) how otherwise the said purchase price falls to be treated or disposed of. G

By the will of Lord Winterstoke, the residuary estate was settled upon two ladies for life. One of the tenants for life, Mrs. Richardson, died on Sept. 22, 1936, and on her death a large amount of estate duty became payable. The trustees sold securities for the purpose of paying this duty. Most of the securities which were sold carried dividend rights, H and personal representatives of the tenant for life claimed to receive an apportioned part of such dividends.

R. W. Turnbull for the plaintiffs, the trustees of the will of Lord Winterstoke : The purchasers got the benefit of the accruing dividends, so that there can be no apportionment as between tenant for life and remainderman. The question has therefore arisen as to whether any equitable apportionment should be made. The actual sum involved is just over £2,100.

Fergus D. Morton, K.C., and *L. W. Byrne* for the personal representatives of Mrs. Richardson: In the case of each of the investments, the
A dividend was accruing up to the date of the death. If there had been no sale, the tenant for life would have had a right to a portion of that dividend under the Apportionment Act, 1870, and the right under the Act arises when the dividend becomes due and payable. Apart from the sale, there would have been that legal right. The sale took place, not
B because of any provision in the will, but because the duties had to be paid. The right accrues when the dividends become due and payable, and not when they are received by the trustees. In each case the dividend has become due and has become payable and has been paid, but the dividend has not been received by the trustees of the will, but by the
C purchaser, from them. [Counsel referred to *Bulkeley* v. *Stephens* (1).]

W. F. Waite for the other defendants, being persons beneficially interested in the residue: There is no apportionment of the purchase price. The case which has been cited was subsequent to the two well-known cases of *Scholefield* v. *Redfern* (2) and *Freman* v. *Whitbread* (3).
D There is no apportionment upon the sale by the trustees. That was admitted in both those cases. The basis of the rule is that it would greatly increase the burden of trustees, and it may be a matter of extreme difficulty, if not of impossibility, to work out the true position. There is no authority for saying that there should be an apportionment.
E Between 1896 and the present day, there has been no suggestion that the view of STIRLING, J., was wrong. His view is perfectly clear that, where the sale is in the ordinary course of administering the estate, there can be no apportionment, except in special circumstances. There are no special circumstances in this case, and therefore the ordinary rule
F applies. [Counsel also referred to *Re Peel's Settled Estate* (4).]

CLAUSON, J.: Under the will, dated in 1907, of Lord Winterstoke, who died in 1911, very large funds were dealt with upon trust for two ladies in equal moieties as tenants for life and, subject to their life
G interests, in trust for various other people. One tenant for life, Mrs. Richardson, died before the other, and I am concerned with the moiety which was retained to pay the income thereof to her during her life. Mrs. Richardson died on Sept. 22, 1936. The income of the particular fund with which I am concerned was to be paid to her during her life,
H and, subject to that life estate, the trustees were to stand possessed of the fund in various parts for various ascertained individuals. The tenant for life having died, there was a very large sum payable for death duties, which, of course, would have to be raised out of the capital of the fund. It might have been raised by borrowing on the security of the investments. In fact it was raised by selling a number of investments,

and selling them, in some instances, at such dates that the purchaser of the investments would receive, in due course after having completed his purchase, a dividend part of which had accrued during the lifetime of the tenant for life. In those circumstances, the executors of the tenant for life are asking for a direction that the trustees of the will should make good to them, out of the proceeds of sale of those invest- A
ments, the apportioned part, down to the date of the death of the tenant for life, of the dividend so receivable by reason of the sale of the securities by the trustees.

I think it will be convenient, merely in order to simplify language, having stated the position as regards this particular estate, that I should B
now deal with the question in this way. I may take the case where a fund consists of £10,000 government securities carrying a half-yearly dividend. Let me take first the case where the trusts of the fund are to pay the income to A.B. during his life, after his death pay the income to C.D. for his life, and, subject to those two life interests, to hold the fund C
in trust for E.F. A.B. dies at a date at which two months of the current half-year have elapsed. C.D. is surviving, and continues to live until after the end of that half-year, no change being made in the investments at all, nobody doubts at all that it would be the duty of the trustees, on receiving the dividend four months after A.B.'s death, to pay one-third D
of it to the executors of A.B. and pay the other two-thirds to C.D. About that there can be no doubt at all. Suppose, however, that the trusts are not for A.B. for life, and then to C.D. for life, and, subject to their life interests, for E.F., but are for A.B. for life, and, subject to his life interest, for E.F.—in order to consider the point, I have taken no account of E
C.D.—in those circumstances it would be astonishing that A.B. by himself or his executors should receive less income in respect of his life interest than he would have received, if, after his life interest, another life interest had been interposed. It is suggested that, if, in the simple case that I have put of A.B. being the tenant for life and on his death F
the fund being held in trust for E.F., immediately after the death of A.B., in order to raise duty the trustees at the request of E.F. sell the securities in the ordinary way on the Stock Exchange, a sale which would carry to the purchaser the right to receive the whole of the half-yearly dividend—it is suggested that, by reason of that perfectly proper action G
of the trustees, the rights of A.B. are altered, and A.B.'s executors are deprived of the two months' income from the last dividend date to the date of A.B.'s death, which it is obvious, on the terms of the trusts which I have stated, the settlor or the testator intended A.B. to have. In my view, the solution of the difficulty so put is this: that the trustees, when H
they are called upon to sell the securities, and when they do sell the securities, ought so to arrange matters as to preserve, if they can reasonably be preserved, the rights of A.B. One way of preserving the rights of A.B. would be to defer the sale until after the half-year has expired. If they do that, no difficulty arises, because they will themselves have

received the whole of the half-year's dividend, and they will apportion it, and give the executors of A.B. the third to which they are entitled and keep the other two-thirds for E.F. I have some reason to believe that in practice that is very often done. It may be, however, that there are inconveniences in deferring the sale until after the end of the half-
A year, and the trustees feel that they ought to sell the securities at once, as they did in this case. It would theoretically be possible for them to sell to a purchaser on the terms that the purchaser in due course, when the dividend is paid, should account to the trustees, the vendors, for an apportioned part of the dividend, which they would thereupon account
B for to the executors of A.B. No practical stockbroker would ever advise an attempt to deal with securities on sale by such an artificial method as that. Another way would be simply to sell so that the purchaser receives the dividend, and, on the receipt of the purchase price, to set aside out of the purchase price a sum equivalent to the dividend, appor-
C tioned as from the last dividend due before the death until the death of the tenant for life, and to account for that sum to the executors of the tenant for life. That process will carry out precisely what the testator intended, and will give the tenant for life the income which the testator intended that he should have. I have stated what has in fact been
D done. In the present case, the trustees sold before the end of the dividend period, and there is no difficulty in ascertaining that figure which would represent the apportionable dividend from the previous dividend dates last preceding the death of the tenant for life to the date of the death of the tenant for life. The figure has been ascertained, and appears in
E the summons as £2,160 13*s.* 1*d.* I do not propose to say that trustees who sold in those circumstances, and, without the question being raised by anybody, in fact failed to account to the executors of the tenant for life for the apportioned dividend and allowed the whole purchase money to be taken by the remaindermen, would necessarily be
F liable for breach of trust. In small cases, I dare say even in large cases, it has no doubt often been the practice, a practice possibly justified by certain *dicta* of STIRLING, J., in the case of *Bulkeley* v. *Stephens* (1), not to make this special reservation for the tenant for life, or to account to his executors for the sum of the apportioned dividend, but it appears to
G me that, when the question has been raised, and when there is no difficulty in ascertaining the figure which would be payable to the executors of the tenant for life, it would be perfectly proper for the trustees to deal with the matter in the way I have indicated, that is to say, by accounting to the executors of the tenant for life for the apportioned
H dividend.

In the present case, the executors of the tenant for life claim that that should be done. The trustees ask the direction of the court as to whether they should accede to that request and do it. As, in acceding to that request, they seem to me to be carrying out the intention of the testator, and not to be doing any act which is detrimental to or interferes with any right of the remaindermen, I propose to declare that the trustees ought, in the present case, not to treat the whole of the purchase price as capital, but ought to apportion it as between, on the one hand, the remaindermen, and, on the other, the executors of the tenant for life, by paying over to the executors of the tenant for life out of such purchase price the sum of £2,160 13*s.* 1*d.*, being the sum repre- A senting a proportion of dividends accruing on the securities so sold calculated to Sept. 22, 1936, being the date of the death of the tenant for life.

As regards the costs, the costs of this summons must be treated as expenses in administering the estate, and must come out of the capital. B

Solicitors: *Rider, Heaton, Meredith & Mills*, agents for *Osborne, Ward, Vassall, Abbott & Co.*, Bristol (for the plaintiffs and the first two defendants, the personal representatives of Mrs. Richardson); *Gregory, Rowcliffe & Co.* (for the remaining defendants).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*] C

DAVIES *v.* ELMSLIE.

[King's Bench Division (Lewis, J.), **October 15, 1937.**] D

Contract—Illegal contract—Future separation of husband and wife—Averment that wife at all times ready to rejoin husband—No evidence of immoral purpose—Public policy.

The defendant, in consideration of the plaintiff persuading her E husband to go to New Zealand and/or consenting to forgo the consortium of her husband, promised to pay to the plaintiff an allowance of £4 per week until either the defendant should pay the plaintiff's fare to join her husband or her husband's fare back to England. The statement of claim averred that the plaintiff was and always had been ready and willing to join her husband. The husband sailed for New Zealand, and weekly payments were made for a period of about one year, and, F upon the defendant then ceasing to make them, the plaintiff sought to enforce the agreement. The defendant pleaded that the agreement was against public policy, and this question was argued as a preliminary point of law:—

Held: the contract was not void as against public policy. The issue had to be tried upon the facts set out in the statement of claim, and, as it did not appear therefrom that there was anything immoral in the G contract, it was not illegal as against public policy; but it might be otherwise when all the facts were before the court.

[EDITORIAL NOTE. As this is the trial of a preliminary issue of law, it has to be assumed that all the facts stated in the statement of claim are true, and no fact can be assumed that is not there stated. This case, therefore, is an authority H only for the proposition that a contract in the terms stated in the statement of claim is not *per se* against public policy; but it might be so held if an immoral motive was proved.

As to Contracts providing for Future Separation of Spouses, see HALSBURY, Hailsham Edn., Vol. 7, pp. 157, 158, para. 222; and for Cases, see DIGEST, Vol. 12, pp. 264, 265, Nos. 2160-2167.]

Cases referred to:

(1) *Brodie* v. *Brodie*, [1917] P. 271; 27 Digest 223, *1937*; 86 L.J.P. 140; 117 L.T. 542.

(2) *H.* v. *W.* (1857), 3 K. & J. 382; 27 Digest 222, *1935*.

(3) *Re Moore, Trafford* v. *Maconochie* (1888), 39 Ch. D. 116; 27 Digest 82, *647*; 57 L.J. Ch. 936; 59 L.T. 681.

(4) *Re Lovell, Sparks* v. *Southall*, [1920] 1 Ch. 122; 27 Digest 83, *649*; 88 L.J. Ch. 540; 122 L.T. 26.

(5) *Fender* v. *Mildmay*, [1937] 3 All E.R. 402; Digest Supp.; 106 L.J.K.B. 641; 157 L.T. 340.

(6) *Spiers* v. *Hunt*, [1908] 1 K.B. 720; 12 Digest 267, *2188*; 77 L.J.K.B. 321; 98 L.T. 27.

(7) *Wilson* v. *Carnley*, [1908] 1 K.B. 729; 12 Digest 267, *2189*; 77 L.J.K.B. 594; 98 L.T. 265.

PRELIMINARY ISSUE of law raised by the defendant in his defence, that the contract sued upon was founded upon an illegal consideration, and contrary to public policy and void. The pleadings are set out in the judgment.

Hon. Sir Reginald Coventry, K.C., and *W. M. Andrew* for the plaintiff.

R. A. Willes and *G. W. Hignett* for the defendant.

LEWIS, J.: In this case, the statement of claim reads as follows:

> (i) The plaintiff is the wife of Hugo Harold Davies and resides at Shrewsbury. (ii) In or about Jan., 1936, the plaintiff and the defendant entered into an agreement whereby in consideration of the plaintiff persuading her husband to go to New Zealand and/or consenting to forgo the consortium of her said husband, the defendant promised to pay to the plaintiff an allowance at the rate of £4 per week, until either the defendant should pay the plaintiff's passage to join her said husband in New Zealand or the defendant should pay her said husband's passage back to England.

Para. (iii) sets out that the agreement was partly in writing and partly oral, and gives particulars of the letters which form the written part of the agreement. Para. (iv) reads:

> In pursuance of the said agreement the plaintiff persuaded her said husband to go to New Zealand, and her said husband duly sailed therefor, on or about Jan. 20, 1936, and the plaintiff has ever since forgone the consortium of her said husband.

I ought, perhaps, to have mentioned, when referring to para. (iii), that the last of the letters which formed the agreement is dated Jan. 17, 1936.

Para. (v) reads:

> The defendant paid to the plaintiff an allowance at the rate of £4 a week until Jan. 12, 1937, but has failed and neglected to pay her the said £4 a week or any other sum since such last-mentioned date. Further, the plaintiff is and always has been ready and willing to join her said husband.

Then follows the claim for relief.

The defence traverses the allegations other than the allegation contained in para. (i) of the statement of claim, namely, that the plaintiff was the wife of Hugo Harold Davies, and resides at Shrewsbury. Para. (iii) of the defence sets out an alternative defence, to the effect that, if any agreement was made at all between the parties, the defendant, Allan Melrose Elmslie, made the agreement as agent for the plaintiff's husband's mother, Hugo Harold Davies' mother, and he says that he is not personally liable therefor. The only other matter in the defence which requires attention is para. (v), which says :

> Further the defendant says and will contend that the contract alleged and relied upon by the plaintiff and the performance alleged on her part is founded upon an illegal consideration and contrary to public policy and void. A

When that defence was put in, application was made under R.S.C., Ord. 25, r. 2, that the point of law raised by the defendant under para. (v) of the defence (the paragraph which I have just read) :

> be set down for hearing in Middlesex by judge alone and disposed of forthwith and before trial of the issues of fact in this action and it is certified this issue be fit for a speedy trial. B

In considering the issue, I am entitled to look at the record as a whole, and the defendant has to argue the case on the footing that all the statements in the statement of claim are correct. I am not entitled, however, to go outside what appears on the record, or to enquire into the motives C which actuated the parties into making the agreement, or to hear evidence as to the circumstances in which it was made. All I know, and all it would seem that I am entitled to know, of the circumstances of the case is that the plaintiff is a married woman, the wife of Hugo Harold Davies, Hugo Harold Davies left this country on Jan. 20, 1936, and D the defendant is apparently no relation of either the plaintiff or her husband, although, as I have said, in the defence the defendant suggests that he was the agent of the husband's mother. I also know that up to Jan. 12, 1937, the defendant paid what he had agreed to pay, and that he has ceased since that date to pay £4 per week, that he has failed to E pay the plaintiff's passage to New Zealand, or the plaintiff's husband's passage back from New Zealand to this country, and that the plaintiff is, and always has been, ready and willing to join her husband in New Zealand. One other thing appears from the statement of claim, and that is this : the defendant appears to have been, throughout the negotiations F and throughout the making of the contract, represented by solicitors. The plaintiff, on the other hand, as far as one can infer from para. (iii) of the statement of claim, which I have said has to be accepted as correct for the purpose of argument of this issue, has been throughout unrepresented. G

There is one other matter. The agreement as pleaded in para. (ii) does not appear to me necessarily to contemplate a complete separation of husband and wife. Of course, the wife at any time could, by no longer agreeing to forgo the consortium of her said husband, go back to her said husband, thereby, of course, losing the £4 per week. On the other H hand, the defendant at any time, simply by paying the plaintiff's passage money to New Zealand, or the plaintiff's husband's passage money back from New Zealand to England, could get out of paying his £4 per week, and could ensure, so far as it is humanly possible, that the separation of husband and wife was terminated.

Mr. Willes, who argued this case for the defendant, puts his proposition quite concisely in these words: "Any contract in relation to married persons who are living together at the time of the making of the contract is void if that contract contemplates their future separation. The inference to be drawn from the statement in the statement of claim is A that the plaintiff and her husband were living together when the contract was made; that the plaintiff had not forgone the consortium of her husband before Jan. 17, 1936, at the earliest, and it was not until after the agreement was made that the plaintiff and her husband ceased to live together."

B Authorities were cited to me by Mr. Willes in support of that proposition. In *Brodie* v. *Brodie* (1), it was held that an agreement, made before marriage, that the parties when married should not live together was void as against public policy. In *H.* v. *W.* (2), it was held that any agreement made before or after marriage which contemplates the C voluntary separation of husband and wife is void and against public policy. In that case, there was a limitation for the benefit of the husband in the event of the wife leaving home without cause. PAGE WOOD, V.C., held that such a limitation:

> was void as it was a direct inducement to the husband to permit a state of separation D capriciously commenced by the wife to continue.

The next case which was cited to me was *Re Moore, Trafford* v. *Maconochie* (3). In that case, the court decided that a bequest of a weekly allowance to a married woman living at all material times with her husband during such time as she may live apart from her husband was void. E COTTON, L.J., when that case went to appeal, points out, at p. 128, that the avowed object of the bequest was to induce the wife, who was the testator's sister, to live apart from her husband, who was not on speaking terms with the testator. COTTON, L.J., having stated that the apparent object was to induce the wife to live separate from her husband, F goes on to say:

> If so, the gift was for a purpose which is contrary to the law of England, for that law does not allow provisions made in contemplation of a future separation between husband and wife.

It is clear that, in that case, the court had before them some evidence G of the intentions and motives of the testator, and COTTON, L.J., seems to emphasise apparently that, as the purpose of the gift was to induce a separation, the gift was void. The other case cited to me was *Re Lovell, Sparks* v. *Southall* (4). In that case, the testator bequeathed to a married woman with whom he was living an annuity of £750, which H was to be paid to her if she was living with him at the time of his death, for so long as she did not return to her husband and did not remarry. In either of those events, the annuity was to be reduced to £250. The court held that the bequest was not void:

> for that its object was not to induce M.S. [the woman] to continue to live apart from her husband and not to remarry but to maintain her until she returned to her husband or remarried.

Here again the judge appears to have considered the object for which the bequest was made, and it was considered that the object was a relevant and material matter for consideration. After stating in the clearest terms that the law of England does not allow gifts made in contemplation of a future separation between husband and wife, and after referring to Cotton, L.J., in *Re Moore, Trafford* v. *Maconochie* (3), Lawrence, J., goes on to say this, at p. 127 :

> It has long been settled that in the case of separation deeds provisions made for maintenance during the separation are valid and will be enforced by the courts, the reason being that in such cases the separation has already taken place or at all events is in immediate contemplation. So far as the policy of the law is concerned there is in my opinion no distinction in principle between provisions made in separation deeds and provisions made in any other instruments nor (as has been suggested) between provisions made for a wife by a husband and provisions made for a wife by any other person. In the case of a provision made by a stranger the court would no doubt more readily come to the conclusion that the object and purpose of the provision was not to afford maintenance for the wife during the period of separation but to induce the wife not to return to her husband. In the absence however of any evidence showing that the provision was made for an illegal purpose the court would in my opinion uphold a provision for the maintenance of a married woman whilst living apart from her husband where the separation had already taken place at the date when the provision was made, and that whether the provision was made by the husband himself or by any other person.

It is to be observed in the last sentence that I have read that Lawrence, J., was saying that the court, in the absence of any evidence that there was any illegal purpose, would uphold an agreement where the separation had already taken place at the date when the contract was made, but I cannot help thinking, in view of the first paragraph of that same sentence, where he says that the court will enforce provisions in deeds where separation has already taken place, or, at all events, is in immediate contemplation, that he was excluding the case where separation was in immediate contemplation.

As I stated at the beginning of this judgment, I have no evidence whatever before me as to the motive which induced this agreement, and I have said that I know nothing whatever about the parties, except what I can glean from the statements made in the statement of claim. There is, as far as I know, no separation deed as between husband and wife. The wife is, and always has been, ready and willing to join her husband. What the husband's attitude is, I know not. As the contract is pleaded in the statement of claim, it may be interpreted as being in no sense *contra bonos mores* ; on the other hand, it may have a very sinister significance. If Mr. Willes' argument is right, it seems to me that the court would be bound to say that an agreement in the terms of the agreement as pleaded in the statement of claim, where the circumstances were this, was an agreement which was void as against public policy. The circumstances to which I refer are these, which I should have thought were circumstances which are not at all dissimilar. A father has a daughter who is married. The husband, who is as devoted to his wife as the wife is to the husband, gets an opportunity of going to, shall we say of being given employment in, some part of the world where it is almost impossible for a white woman to live. Let us suppose the employment to be for two years. The husband, because of his devotion to his wife, although he realises that the employment is one which will stand him in good stead in the future, says, "No, I am not going to take you, and I do not like parting from you." The wife does not wish to be parted from her husband, but realises, as does the father, that it is going to be the making of the boy. The husband says: "Well, I cannot afford two establishments," and the father says to his daughter: "Very well; if you will persuade Jack [or whatever his name may be] to take this job, which he realises, and everybody else realises, is a very good job for him, for two years, and live apart from him for two years, I will see that you do not starve, and I will make you an allowance of £5 a week." I confess that I personally, unless I am bound so to hold, would not have thought that that sort of agreement was an agreement which was void as against public policy. I put that case, not exactly in all that detail, to Mr. Willes, and Mr. Willes was bound to say that it was right, it being an agreement which contemplated the future separation of spouses, that the law says that that is one which is void.

When Sir Reginald Coventry addressed me for the plaintiff, he referred me to the opinion of LORD THANKERTON in *Fender* v. *Mildmay* (5), and, more particularly, to that portion of the opinion of LORD THANKERTON which occurs at pp. 414, 415, 416. LORD THANKERTON is there dealing with the question of public policy. He points out that separation agreements have been treated as law although such agreements limit consortium between husband and wife, but adds that such agreements have been held to be valid, and are valid, unless they are merely contingent on a future state of separation. I venture to think that by adding those qualifications LORD THANKERTON was not excluding cases such as have been referred to by LAWRENCE, J., where, at the time of making the agreement, separation was in immediate contemplation, although, at the time of making the separation deed, there was no physical separation at all. It occurs to me, and I do not think that LORD THANKERTON was excluding the case which was put by LAWRENCE, J., that there must be many cases where the parties are not actually living apart when the agreement to separate, which has been in contemplation for some time, is made. LORD THANKERTON, having considered all these cases on the general line of public policy, more particularly, of course, in the case with regard to whether it is against public policy for a married man to promise to marry a woman when his wife is still alive, goes on to say this, at p. 415:

> This consideration makes clear, to my mind, with all respect to my noble and learned friends who hold a contrary view, that there is no general principle of public policy that no contract is enforceable which is inconsistent with maintenance of the obligations of the marriage tie, or, to phrase it otherwise, with loyalty to the other spouse. I am, therefore, not surprised, on consideration of *Spiers* v. *Hunt* (6) and *Wilson* v. *Carnley* (7), to find that these decisions are mainly based on the general tendency of the contracts under consideration to immorality or crime.

Mr. Willes' argument to the effect that this contract is void and cannot be enforced is based on the argument that it is void as against public policy, because it is inconsistent with the maintenance of the obligations of the marriage tie. If I understand aright what Lord Thankerton is saying, it is this: " After considerable research and going through all the authorities, I find that there is no general principle of public policy that no contract is enforceable which is inconsistent with maintenance of the obligations of the marriage tie."

I therefore come to this conclusion, respectfully adopting, as I do, what Lord Thankerton has said, that, in a case like the present, where the defendant is setting up that the agreement is void because of illegal consideration, and where the court is in entire ignorance as to the circumstances, or whether there was anything immoral in the contract, that, in those circumstances, the defendant has got to satisfy the court, if there be no general principle of public policy involved, that the particular contract is a contract which is contrary to public policy. As I have said, the rule under which this issue was set down for hearing prohibits me from enquiring or hearing any evidence as to the circumstances of the people, or what was behind this agreement. I do not shut my eyes, of course, to the facts, and I think I have already said that, looking at the agreement as set out, it might bear an interpretation which would be clearly an interpretation which any court could say was against public policy. I know nothing whatever about the facts of the case, but, in order that I may make my meaning clear, it might mean this, that this man, the defendant, was actually paying somebody else's wife £4 a week to separate from her husband, in order that she might live with him in adultery. I am not saying that that is the case at all here. On the other hand, this agreement may mean that the circumstances may be those of, or somewhat similar to, the hypothetical instance which I gave, and it seems to me that, in those circumstances, having no evidence before me at all as to the motive which actuated the parties in making this agreement, I must come to the conclusion that the proper view for me to take is to say that the defendant has not satisfied me in law that this agreement is void for public policy. I can infer only this, that, in so far as one of the facts which I have to accept as true is that the plaintiff is and was always ready and willing to live with her husband, it would seem, to my mind, from her point of view, at all events, that there was no desire to live apart from him.

In those circumstances, I have come to the conclusion that this issue must be decided in favour of the plaintiff, and that the contract is not void as against public policy or based on an illegal consideration.

Judgment for the plaintiff with costs. Leave to appeal.

Solicitors: *Piesse & Sons*, agents for *B. D. J. Hayes*, Shrewsbury (for the plaintiff); *Peacock & Goddard*, agents for *Shakespeare & Vernon*, Birmingham (for the defendant).

[*Reported by* C. St. J. Nicholson, Esq., *Barrister-at-Law.*]

SMITH *v.* BIRKENHEAD CORPORATION.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., du Parcq and Atkinson, JJ.), **October 14, 1937.**]

A *Highways—Street works—Private street—Provisional apportionment of expenses—Basis of apportionment—Sufficiency of particulars—Birkenhead Improvement Act*, 1884 (*c. lvi*), *s.* 21, *Sched.* II.

By the Birkenhead Improvement Act, 1884, Sched. II, it is provided that, when certain works for the improvement of private streets are undertaken by the corporation, the estimated expenses of executing the works shall be provisionally apportioned among the premises fronting or adjoining or abutting on such street, and that the provisional apportionment B "shall also state whether the apportionment is made according to the frontage of the respective premises, or not, and the measurements of the frontages and the other considerations (if any) on which the apportionment is based." The corporation proposed to carry out certain works, and made a general provisional apportionment which purported to be "principally according to the frontage of the respective premises and having regard to all the circumstances of the case and the C amount and value of the work already executed by or on behalf of certain frontagers," but which did not specify the particular "circumstances of the case" or particulars of the "value of the work already executed," with the result that it was not possible for the correctness of the amount of the apportionment to be checked by each individual frontager, including the appellant, who took the preliminary objection that the D requirements of the statute had not been complied with. The justices decided that the apportionment sufficiently complied with the statute, "having regard to the difficulties in showing all the details of any such proposed works in a document such as the provisional apportionment." Thereupon this appeal was brought:—

HELD: the provisional apportionment was too general, and did not comply with the requirements of the statute, as it did not contain E sufficient particulars to enable each individual owner to ascertain and check the basis of computation.

[**EDITORIAL NOTE.** Though this case is decided under a local Act, the terms of that Act are sufficiently close to those of the general Act to make it of general application. The provisional apportionment must give sufficient particulars for each frontager to check its accuracy.

F AS TO PROVISIONAL APPORTIONMENTS, see HALSBURY, Hailsham Edn., Vol. 16, pp. 453, 454, para. 659; and FOR CASES, see DIGEST, Vol. 26, pp. 543, 544, Nos. 2409-2425.]

APPEAL by way of case stated from a decision of the justices for the county borough of Birkenhead. The facts and the arguments are set G out in the judgments.

Allister Hamilton for the appellant.

Ralph H. Etherton for the respondents.

LORD HEWART, L.C.J.: This is a case stated by justices for the H county borough of Birkenhead. The difficulty arose in the following way. Objections by the present appellant were made to the proposals of the corporation of Birkenhead under the Birkenhead Improvement Act, 1884, with regard to certain private street works in Upland Road, Birkenhead. Those objections were being heard by the justices on Jan. 27, 1937. Thereupon the appellant took the preliminary objection that the requirements of the local Act had not been fulfilled with regard to the provisional apportionment of expenses. The gist of the matter is contained in the contention of the appellant, which is summarised as a statement of fact by the justices. The case said that:

> The basis of division is different in different columns [of the provisional apportionment], and in some columns the appellant has been charged on a footing A different from other owners in the same columns, but the apportionment contains no statement or explanation as to how the various factors (stated in the heading of the apportionment as the considerations on which the apportionment is based) have been applied in the division of the estimated cost of the work, between the various owners.
>
> It is impossible for the appellant or for any individual frontager to ascertain otherwise than generally with regard to his or her respective premises, from the B provisional apportionment or from any of the documents deposited in pursuance of the Improvement Act, either how the consideration or considerations on which the apportionment against the appellant or such individual frontager, with regard to his or her respective premises, was applied or to ascertain how the amount charged against the appellant or such individual frontager on his or her respective premises is arrived at or to check the correctness of such amount.

In that state of facts, the appellant contended, among other things, C that the requirements of the Improvement Act and the Second Schedule to it had not been complied with, and that the particulars which were furnished were vague, ambiguous and embarrassing, and did not constitute a compliance with the requirements of the Act. The contrary was contended on the part of the respondents, and, in the result, the justices D came to the conclusion:

> that the provisional apportionment sufficiently complied with the requirements of the Improvement Act and the Second Schedule thereto having regard to the difficulties in showing all the details of any such proposed works in a document such as the provisional apportionment and we overruled the appellant's objection and adjourned the further hearing of the said objections to the said proposals. E

Then the question for this court is whether, in so deciding, the justices came to a correct determination in point of law.

This matter is really quite simple. The Birkenhead Improvement Act, 1884, s. 21, provides that:

> (1) Where a street . . . or carriageway or footway . . . is not sewered, levelled, paved, F metalled, macadamised, flagged, kerbed, channelled or made good or is not lighted to the satisfaction of the corporation the corporation may from time to time resolve with respect to such street or part to do any one or more [of certain works].

It is provided that the expenses incurred by the corporation in executing the private street works shall be apportioned among the premises fronting G or adjoining or abutting on such street or path. The section goes on to provide that the surveyor is to prepare specifications, estimates and provisional apportionments, with plans, and by subsect. (3) it is provided, among other things, that:

> Such . . . provisional apportionments shall comprise the particulars prescribed H in the first part of the Second Schedule to this Act and shall be submitted to the corporation who may by resolution approve the same respectively with or without modification or addition as they think fit.

It is further provided that the resolution approving the specification, etc., shall be published in a certain manner, and that the document shall be kept deposited at the municipal offices, and be open to inspection.

Then follow provisions with regard to objections to the proposed work. The owner of the premises may make an objection on various grounds, one of which is that the provisional apportionment is incorrect in regard to some matter of fact, which is specified in the objection, or in regard to the degree of benefit to be derived by any persons, or the amount or A value of any work already done by the owner or occupier of the premises; and there is a proviso that any owner of any premises shown in a provisional apportionment as liable to be charged may object, on the ground that any premises ought to be excluded, or on the ground that the provisional apportionment is incorrect in regard to some matter. Now, B what is it that, by the provisions of this Act, the provisional apportionment must state? That question was answered by the Second Schedule, Pt. 1, para. 4, of the Act, under the heading "Provisional apportionments." It says:

> These shall state the amounts charged on the respective premises and the names C of the respective owners or reputed owners [there is no question about that in the present case], and shall also state whether the apportionment is made according to the frontage of the respective premises, or not, and the measurements of the frontages and the other considerations (if any) on which the apportionment is based.

The reason why those words are present in the schedule is to be found D in the provisions of sect. 25 of the Act, where there is a proviso:

> that the surveyor may settle the apportionment as having regard to all the circumstances of the case and not merely to frontage he may deem most just.

It will be observed, therefore, that one of the things which the provisional apportionment is required to do is to state the other considerations, if any, on which the apportionment is based. Those being the require- E ments of the statute, the provisional apportionment in this case consisted in the body of it, of a series of columns giving the names of owners, description of premises, frontages, the nature of the works under various headings, and the total cost and the heading read in this way:

> F . . . pursuant to the provisions of the Birkenhead Improvement Act, 1884, and principally according to the frontage of the premises and having regard to all the circumstances of the case, and the amount and value of the work already executed by or on behalf of certain frontagers.

It is apparent, therefore, that the provisional apportionment does not G say that the apportionment is made according to the frontage of the premises. That question is answered in the negative. Then, does it go on to say what are the other considerations on which the apportionment is based? I think that clearly the answer to that question is no. It says that other considerations have been taken into account, but it does not say what they are, nor how, nor to what extent, they have H been taken into account. All it says is:

> . . . principally according to the frontage of the respective premises and having regard to all the circumstances of the case, and the amount and value of the work already executed by or on behalf of certain frontagers.

It is contended, on behalf of the appellant, that that statement does not comply with the requirement of the schedule. Mr. Etherton, if I

follow his argument, argues, in the first place, that this word "and" after "circumstances of the case" is really an exegetical "and." It is not adding anything, but is merely explaining what are the circumstances of the case. That is not the natural construction of this document. As it stands, there must be an enumeration of three things as the basis of
the computation: (i) "principally according to the frontage," (ii) A
"having regard to all the circumstances of the case," and (iii) "and the amount and value of the work already executed by the frontagers." Even if it were the case, as I do not think it is, that the circumstances of the case referred to are known, other than the words afterwards
mentioned, namely, "the amount and value of the work already B
executed," I cannot think that this document fulfils the requirements of the Act. As it is, the reader, the owner of the premises, is left wondering: "To what extent is the frontage treated as the basis? To what extent are other circumstances, and what circumstances, brought into
the calculation? And, if I am being credited with the value of the work C
already executed by me, or on my behalf, what is the sum with which I am credited?" Then one looks below the headings, at the figures, and no light at all is thrown upon any of those questions. What is easily apparent, if one compares a few sets of premises, is that various
methods have been followed. It is impossible to find here a uniform D
scale. It might conceivably be the case, for example, that an owner had had executed for him work which cost £75. The surveyor, in making this estimate, might have given him credit for £15, £20, £25, £30, £40 or £50. There is nothing here to show to what extent credit has been
given. E

I think the purpose of this Act is reasonably plain. Particularity is required for the information, on the one hand, of the respective owners, and not least the members of the corporation, who have to bring their minds to the question whether they are prepared to approve the resolu-
tion which confirms the document. If they are to bring an intelligent F
mind to bear upon that question, they must know upon what principle the figures have been arrived at. It seems to me that, where the surveyor, no doubt for good and sufficient reason, has chosen to depart from the simple computation according to the frontage of the premises,
he ought to state in clear language what, and how far, and by what G
method, other matters have been taken into consideration. To apply that canon to the present case, the surveyor, it seems to me, ought to state quite plainly, and it could be done in a few words, what are the circumstances of the case to which he has had regard, and, where he
has had regard to the amount and value of the work already executed H
by the frontager, what, in each case, is the amount which he has put to the frontager's credit. There ought, one would think, to be one weight and one measure for all, but, indeed, if there are different measures, if no uniform scale is applied, it ought clearly to be shown how and where the deviation takes place. I should have thought it would have been

quite simple for the surveyor, in a brief document, not to suggest, but to show, what are the various circumstances to which he has had regard—and that will indeed be a simple task if Mr. Etherton is right in contending that the words "and the amount and value of the work already executed" are merely explanatory of that expression—and then to add A a schedule where he shows, in respect of each respective owner, what is the amount and value of the work already executed by him, or on his behalf, which has been brought into the calculation. Some method there must be. A surveyor cannot be heard to say, nor would he dream of saying, that all this is haphazard. There must be some method, some B principle, some ratio, and, if so, it is capable of brief and clear expression. I think that this schedule requires that, for the benefit of the respective owners, as indeed also for the benefit of the corporation and those whom the corporation represent, there should be a complete and specific disclosure. As it is, the whole matter is left vague, and the individual C owner is left speculating, in his own case, not only what has been taken into account, but also by what method the calculation has been made, and, where he is credited with having spent money, what is the amount with which he is so credited. In my opinion, the contention of the appellant was right, and this provisional apportionment does not exhibit D the particularity for which the statute provides. Particulars are particulars, not generalities. These are generalities in this document. I think, therefore, that this appeal ought to succeed, and that the case ought to go back to the justices.

I do not think it is desirable that we should prescribe to the justices E the course which they should then observe, but it is to be noted that by sect. 23 of the Act it is provided that:

> the court [the justices] may quash in whole or in part or may amend the resolution plans sections estimates and provisional apportionments or any of them on the application either of any objector or of the corporation. The court may also if it thinks fit adjourn the hearing and direct any further notices to be given.

F Though not laying down any course to be followed, and merely indicating a course which might be taken, I should have thought that the simple course would be for the justices to adjourn the hearing and to direct that further notices be given of a provisional apportionment amended in the sense which has been indicated. For those reasons, it appears to G me that this appeal ought to be allowed with costs.

DU PARCQ, J.: I agree, not only in the result, but also with all the reasons which have been suggested by LORD HEWART, L.C.J. I wish to add only this. The justices state their opinion in this way: H

> We were of the opinion that the provisional apportionment sufficiently complied with the requirements of the Improvement Act and the Second Schedule thereto having regard to the difficulties in showing all the details of any such proposed works in a document such as the provisional apportionment.

With great respect to the justices, there seem to me to be two errors in that. First, they seem to have thought that it would in some way impair the symmetry or destroy the proper form of a document like a provisional apportionment if it contained any more information. There is no sanctity, so far as I know, about the form of a provisional apportionment. What is quite clear is that it must, under this Act, contain certain statements and particulars, which this provisional apportionment did not contain. The second error is that the mere fact that it may cause a little more difficulty and may be a little more trouble to comply with the requirements of the Act is not a ground for saying something is a compliance with the Act, because it would be difficult to add any more. I think that the justices were wrong so far as they thought it was part of their duty to save trouble for those upon whom the legislature, when this Act was passed, laid certain duties. Those duties must be carried out. I agree with the judgment of LORD HEWART, L.C.J.

ATKINSON, J.: It seems to me that the wording of the Second Schedule, in so far as it is relevant to this case, is clear and beyond question. The provisional apportionment must specify each and every consideration which has entered into the apportionment, and, if a consideration affects only certain of the columns, certain of the expenditure, it must be stated which they are. One consideration in this case is the value of the work already executed. A general statement of that kind is no use to anybody, and it is almost certainly incorrect, because it is difficult to think of a particular expenditure by a frontager on particular work affecting the whole apportionment. I think that the schedule ought to state which figures have been affected by the cost or value of the work already done, and to what extent. I agree with what my brethren have said, and that the appeal should be allowed with costs.

Appeal allowed with costs.

Solicitors: *Bartley, Cocks & Bird* (for the appellant); *F. Venn & Co.*, agents for *E. W. Tame*, Town Clerk, Birkenhead (for the respondents).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

WILTSHIRE BACON CO., LTD. *v.* ASSOCIATED CINEMA PROPERTIES, LTD.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Romer and MacKinnon, L.JJ.), **October 15, 1937.**]

Practice—Costs—Action for nuisance—Claim for injunction and damages—Motion for interlocutory injunction—Claim for damages satisfied by payment in—Claim for injunction abandoned—Liability for costs of motion and application for costs at hearing of action.

The plaintiffs complained that a building which the defendants were erecting would interfere with certain ancient lights. Negotiations were entered into to see if the parties could agree a sum by way of compensation for the damage which the plaintiffs alleged would be caused to their property. No agreement was reached and the plaintiffs issued a writ claiming an injunction to prevent the erection of the building in such a way as to obstruct the plaintiffs' ancient lights. Leave to serve notice of motion with the writ was obtained. At the hearing of the motion a consent order was made, whereby, the defendants giving an undertaking not to increase the rate of construction of their building and the plaintiffs giving a cross-undertaking as to damages, it was ordered *inter alia* that the trial should proceed on the issues in the affidavits filed on the motion. The costs of the motion were reserved to be dealt A with at the trial. The defendants then paid a sum of money into court in satisfaction of the claim for damages, liability for which was admitted, but with a denial of the plaintiff's right to any injunction. The plaintiffs took this sum out of court and abandoned their other claims. The only question remaining being one of costs, what would have been the trial of the action took the form of an application to the trial judge for B costs:—

HELD: (i) the failure of a party to obtain an injunction at the trial, does not necessarily show that an application for an interlocutory injunction was not warranted, and, in the circumstances of the present case, the plaintiffs were entitled to the reserved costs of the interlocutory motion.

(ii) the defendants were not in the circumstances entitled to an inquiry C as to damages under the plaintiffs' cross-undertaking given on the hearing of the motion.

(iii) the plaintiffs were entitled to costs of the application for costs before the trial judge.

Order of FARWELL, J., [1936] 3 All E.R. 1044, *discharged.*

[EDITORIAL NOTE. FARWELL, J., was of opinion that the plaintiffs, by taking out D the money paid into court, had admitted that they were not entitled to a final injunction, and, therefore, were not entitled to the costs of the motion for an interlocutory injunction. The Court of Appeal have dissented from this view and taken the view that the interlocutory motion is merely for keeping the matter *in statu quo*, and that, if at the trial the court in its discretion considers the case is best met by awarding damages in lieu of an injunction, the plaintiff should still have his costs E of the interlocutory motion. It followed from this decision that there need be no inquiry as to damages under the usual undertaking given upon an interlocutory motion.

AS TO COSTS ON PAYMENT IN, see HALSBURY, Hailsham Edn., Vol. 26, pp. 62, 63, para. 100; and FOR CASES, see DIGEST, Practice, pp. 493, 494, Nos. 1693-1709. See also YEARLY SUPREME COURT PRACTICE, 1937, pp. 366-368.]

F

Cases referred to:

(1) *Imperial Gas Light & Coke Co. (Directors, etc.)* v. *Broadbent* (1859), 7 H.L.Cas. 600; 28 Digest 391, *205*; 29 L.J.Ch. 377; 34 L.T.O.S. 1.

(2) *Shelfer* v. *City of London Electric Lighting Co., Meux's Brewery Co.* v. *City of* G *London Electric Lighting Co.*, [1895] 1 Ch. 287; 28 Digest 415, *408*; 64 L.J.Ch. 216; 72 L.T. 34.

APPEAL from a judgment of FARWELL, J., delivered on Nov. 26, 1936, and reported [1936] 3 All E.R. 1044. The facts are fully stated in that report and in the judgment of SIR WILFRID GREENE, M.R.

H *C. E. Harman, K.C.*, and *Andrew Clark* for the appellants.

Sir Herbert Cunliffe, K.C., and *J. V. Nesbitt* for the respondents.

SIR WILFRID GREENE, M.R.: This is an appeal by the plaintiffs in the action from an order of FARWELL, J., dated Nov. 26, 1936. The action was an action whereby the plaintiffs, who are the owners of certain freehold premises in Swindon, sought to restrain the defendants, who were proposing to erect a cinema on a site opposite, from interfering with their right to light. The matter began in Mar., 1936, and a good deal of correspondence took place, into which I do not propose to go, but I shall have a word to say about it at the conclusion of this judgment, when I come to deal with an argument which has been based upon it. At the present moment, it is sufficient to say that negotiations without prejudice went on for many months, but that in the end they were abortive. By the end of July, I think it was, the defendants started to put up their steel framework, and on Sept. 9 the plaintiffs asked for an undertaking, which was refused. On Sept. 18 they issued a writ asking for the usual relief in cases of this kind. With the writ, they served a notice of motion for an interlocutory injunction. The matter came before the vacation judge, and, when the motion was finally disposed of on Oct. 7, he made an order, to which it is necessary to refer. The order contained an undertaking in damages by the plaintiffs, inserted by reason of the fact that the order also contained an undertaking by the defendants as to what they would do pending the trial. That undertaking was as follows:

> The defendants by their counsel undertake until judgment in this action or until further order not to put on any additional workmen or otherwise increase the rate of construction of their proposed new premises No. 37 Regents Street Swindon in the county of Wiltshire.

The order was a consent order, and the costs of the motion were reserved. The reason why that undertaking was given was that the plaintiffs were asserting, while the defendants were denying, that unusual haste was being used in the erection of the building, and the undertaking was put in in order to ensure that no attempt should be made by the defendants to hurry on the building so as to confront the court at the trial with a state of affairs which it would be difficult to undo. It is to be observed that at that time, and indeed down to Nov. 4, the defendants were denying any infringement or intended infringement of the plaintiffs' rights. That attitude was maintained down to Nov. 4, when they paid into court a sum of £300. The notice of payment into court which was served was to the following effect:

> Take notice that the defendants have paid into court £300 and say that that sum is enough to satisfy the plaintiffs' claim for damages (the liability for which is admitted) but that the defendants deny the plaintiffs' right to any injunction.

The wording of that suggests some little confusion between a right of action, of which there is only one, and the remedies, of which there were possibly two, but in substance it comes to this, that the notice admits that what the defendants were doing, or were proposing to do, amounted to an infringement of the plaintiffs' rights, and all that it says with regard to an injunction is that, if the matter goes to trial, and if the money is not taken out of court, they at the trial will say that the case is one, not for an injunction, but for damages.

That sum was accepted by notice dated Nov. 12, and the notice is as follows:

> Take notice that the plaintiffs accept the sum of £300 paid by the defendants into court in satisfaction of the claim in respect of which it was paid in and abandon their other claims in this action except that they will contend that they are entitled to be paid their costs of the motion herein which were reserved by order dated Oct. 7, 1936.

Subject to the question of costs, that acceptance was an acceptance of the sum paid in in full satisfaction of their cause of action, and, after it was paid out, it was of course impossible for the plaintiffs to proceed with the action and claim an injunction in addition to the money they had taken out of court. The action having been set down, and the action not having been finally disposed of by these means, it came on for hearing on Nov. 26, before FARWELL, J. There were two questions which were argued before the judge, and in respect of which he delivered judgment, which is reported in [1937] Ch. 231. The order which he made was to this effect, that the plaintiffs got the costs of the action down to the date when the money was paid into court, the defendants were given the costs of the motion, which had been reserved, and an inquiry was ordered as to the damages, if any, sustained by the defendants by reason of the undertaking, which was embodied in the interlocutory order, to the effect that they would not increase the rate of construction of the premises.

From that judgment the plaintiffs appeal, and they say that the judge was wrong in giving to the defendants the costs of the motion, and was wrong in ordering that inquiry as to damages. It is to be noticed from the judgment of the judge that he decides the matter, quite clearly not with reference to any special facts of the case, but on what he conceives to be the principles applicable to those facts. I will first of all deal with what he says on the question of costs. He says, at p. 234:

> If a plaintiff in an action of this kind moves for an interlocutory injunction, he does so at his own risk as to costs, and, if on the motion he obtains an injunction and the costs are reserved, he may be liable to pay the costs of the motion if at the trial he fails to establish his right to an injunction and gets relief by way of damages only.

In connection with those observations, it is, I think, important to remember that there is only one cause of action, but there are alternative remedies, and the plaintiff, who complains of an infringement of his right to light, and establishes the validity of that complaint, is *prima facie* entitled to an injunction. In the old days that would have been the only relief that he could have got from a court of equity; now, if he establishes his right to an injunction, the court is entitled as a matter of discretion, if on consideration of all the circumstances it so thinks proper, to substitute for that remedy a remedy in damages only. I myself should have thought, in a case where at the trial the plaintiff has established his cause of action, i.e., has established his *prima facie*

right to an injunction, but the judge decides that the case is one in which he will award damages only, and not an injunction, that as a general rule if the plaintiff had obtained an injunction on motion, and the costs had been reserved, he would get those costs at the trial, the reason being that he had been put into the position of being forced to bring this action, and that he had established his *prima facie* right to an injunction, losing A
it only because the judge decided that, on the facts, damages would be the proper remedy. I must not be taken by that to be laying down any hard-and-fast rule, because quite clearly in many cases the facts may be such as to justify the giving of those reserved costs to the defendants, or at any rate depriving the plaintiffs of them. I am only B
examining the matter on principle, as the judge does, and in my opinion the normal order to make in such a case would be to give the plaintiff his costs of the interlocutory motion. The judge goes on as follows:

> That is not the position here because the action never came to trial; but the plaintiffs by taking the money out of court in satisfaction of the whole claim must C
> be taken to have abandoned their claim to an injunction with the same result as far as the costs are concerned as if they had sought an injunction and failed to obtain it.

With great deference to the judge, I am not sure that his observations really give effect to the distinction between an interim injunction and a final injunction. It does not appear to me to follow by any means D
that, because at the trial the court in its discretion declines to grant an injunction and gives damages, an injunction granted on motion was necessarily granted in such circumstances as to justify the court in saying that the plaintiff was not warranted in asking for it, and therefore should bear the costs of the motion. It seems to me, as I have already said, E
that that result would not in the normal case follow at all, and I cannot, with respect, accept the view of the judge. Looking at the matter purely on principle, the position appears to me to be this. The defendants at the time of the motion contested the plaintiffs' right to any relief at all, but at a subsequent date they admitted that their acts F
were infringing or would infringe the plaintiffs' rights. If the plaintiffs had not elected to take that money out of court, but had continued with their action to trial, they might or might not have obtained an injunction. I know not; but suppose that they had obtained damages, and not an injunction. The effect of the payment into court, if not G
accepted, would of course have an effect on costs, but the mere fact that they did not obtain an injunction at the trial does not seem to me to have any necessary bearing on the propriety of the launching of the motion. In the absence of some circumstance which makes the launching of such a motion in other ways improper, my view is that the H
plaintiffs in such a case as this would be entitled to the reserved costs. The judgment of the judge, in my opinion, upon that matter, cannot stand.

The other matter is that relating to the inquiry as to damages. The judge says, at p. 233 with regard to that:

> The plaintiffs have never established their right to the injunction which they

sought and they are consequently liable to the defendants for any damages which they may have suffered as the result of the undertaking which the defendants gave.

With great deference to the judge, I cannot accept that view. When the motion came before the vacation judge, the defendants were, of course, in the usual position that they could either resist the claim for an interim injunction, or they could come to some accommodation by offering an undertaking which might be accepted. The case that they were making at that time, quite apart from their allegation on the merits that there was no infringement of the plaintiffs' rights at all, was of this nature. They said: " The conduct of the plaintiffs during the history of this matter has been such that it would be unjust to grant an injunction which would interfere with the defendants' building." That was the case that they were making and putting up before the vacation judge. Instead of pursuing the argument to its bitter end, the not unnatural course was taken of coming to an arrangement and giving an undertaking, but be it observed that that position followed inevitably from the circumstance that at that date the defendants were disputing the right of the plaintiffs to any relief at all. That attitude they afterwards abandoned by admitting liability, i.e., admitting that they were infringing. In those circumstances can it be said that the plaintiff is put, by a payment into court of that kind, into this dilemma, that he must either refuse to take the money out of court and risk the consequences, and go on to trial in order to establish the fact that he was right in pressing for and obtaining that undertaking, or must take the money out of court and automatically, according to the judge's judgment, and inevitably submit to an inquiry as to the damages caused by the undertaking which he has given. It appears to me that no such dilemma really arises, and the judge has applied a principle which in my opinion does not really exist at all. The position is this, that the plaintiffs, by the admission of the defendants, have established their cause of action; that is incontestable. The fact that they have not pressed for an injunction, or even the fact, if it be the fact, that, if they had done so, they would not have obtained it from the court, does not necessarily imply in the very least that the undertaking was one which ought never to have been asked for or accepted, and was in the circumstances wrong. Here again there may be cases where the facts would show that the undertaking in the circumstances ought not to have been asked for, and that the inquiry as to damages ought to be granted, but, apart from some special facts, it appears to me, if I may say so, with all respect to the judge, that in a case of this kind the plaintiff is not to be put to an inquiry as to damages in respect of that kind of undertaking.

Now I have dealt with the matter so far without any reference to the argument which Sir Herbert Cunliffe put forward, and which indeed, as I understood it, was the only argument. Sir Herbert Cunliffe did not really attempt to support the principles on which the judge appears to have decided the case. The way he put his case was this. He said that this is an exercise of discretion by the judge with all the facts before him. As I have said, I am unable to accept the view that this was a case of discretion at all, but in spite of that Sir Herbert, of course, is entitled to ask this court to uphold the judgment on the grounds which he has brought forward, although they are different grounds from those on which the judge acted. He has read to us a great deal of correspondence, about which I make no complaint, which he says establishes this proposition, that the plaintiffs down to the time when the action was launched were claiming, and were claiming only, a money payment, and were not claiming an injunction, and gave no indication that they wished for an injunction, and he says that in those circumstances it would have been unfair and improper for the court on the hearing of the motion to grant an interlocutory injunction, because no injunction ought to be granted in a case where the plaintiffs indicate that damages are a sufficient remedy. I have carefully followed the correspondence which has been read. A substantial part of it is without prejudice. I am not quite clear how it came about that those letters were before the court, but no objection seems to have been made on either side, and I must treat those letters as being before the court. I am quite unable to construe that correspondence, taken as a whole, and conducted as it was down to a certain point in a spirit of neighbourliness and a desire to help, as containing, expressly or by implication, any abandonment by the plaintiffs of any claim for an injunction which they might have, or any indication that relief of that kind might not be asked for in the event of negotiations breaking down. In fact in a letter towards the conclusion of the correspondence, it is made clear that the expert adviser of the defendants never interpreted the correspondence as involving any such attitude on the part of the plaintiffs. Having regard to the fact that the correspondence does not appear to me to be such as to prevent the plaintiffs asking for an injunction in the action, it seems to me that for the purposes of the present argument it really does not carry the defendants any way at all.

The result is that the judgment of the judge on both points must be reversed, the plaintiffs should have the reserved costs of the motion, and there will be no inquiry as to damages such as was ordered by the judge. That conclusion I come to first of all on principle, disagreeing respectfully with the judge's view as to the principles applicable, and secondly on a consideration of the special facts which were urged by Sir Herbert Cunliffe.

Romer, L.J.: When the defendants on Nov. 4, 1936, paid £300 into court, they necessarily admitted, and now admit of course, that the building they were erecting or proposing to erect would be an infringement of the plaintiffs' legal rights. That being so, when the plaintiffs issued their writ on Sept. 18, 1936, they were *prima facie* entitled to an injunction to restrain the infringement by the defendants of their legal rights. As in the course of this argument, and indeed as I gather in the course of the argument before Farwell, J., some doubt seems to have been cast on the rights of a plaintiff whose legal rights have been infringed, I would like to refer to what was said by Lord Kingsdown in *Imperial Gas Light & Coke Company* v. *Broadbent* (1), in a passage which was cited by Lord Halsbury in the *Shelfer* case (2), at p. 310:

> "The rule I take to be clearly this: if a plaintiff applies for an injunction to restrain a violation of a common law right, if either the existence of the right or the fact of its violation be disputed, he must establish that right at law"—and, I presume, its violation—"but when he has established his right at law, I apprehend that unless there be something special in the case he is entitled as of course to an injunction to prevent the recurrence of that violation."

A. L. Smith, L.J., dealing with the same aspect of the matter in the *Shelfer* case (2), at p. 322, says this:

> Many judges have stated, and I emphatically agree with them that a person by committing a wrongful act (whether it be a public company for public purposes or a private individual) is not thereby entitled to ask the court to sanction his doing so by purchasing his neighbour's rights, by assessing damages in that behalf, leaving his neighbour with the nuisance, or his lights dimmed, as the case may be. In such cases the well-known rule is not to accede to the application, but to grant the injunction sought, for the plaintiff's legal right has been invaded, and he is *prima facie* entitled to an injunction.

Then, as is well known, A. L. Smith, L.J., proceeds to indicate the special, and one may say the very special, circumstances which must exist before the court in the exercise of its discretion will award damages in lieu of granting an injunction. When, therefore, the plaintiffs in this case issued their writ on Sept. 18, they were *prima facie* entitled to an injunction. Further than that, they were entitled, according to the rules of procedure in these courts, to apply at once to the court for an interim injunction for the purpose of keeping matters *in statu quo* pending the decision by the court as to the existence or non-existence of any cause of action. They moved the court, as we know, before Lewis, J., and on that occasion no injunction was granted, nor was an undertaking not to build at all in the meantime given, but a modified undertaking was given as to the extent to which the defendants should be entitled to build pending the trial of the action. In my opinion for the purposes of the decision of this case it matters not that it was an undertaking which was given instead of an injunction granted by the court, nor does it matter at all for the purposes of the decision of this case that the undertaking was an undertaking not to build beyond a certain rate rather than an undertaking not to build at all. I propose to deal with this case on the footing that on Oct. 7 this court granted an injunction to restrain the defendants from proceeding with their building pending the trial of the action, taking from the plaintiffs, of course, the usual undertaking in damages. I will further assume, because I agree with Mr. Nesbitt that for the purposes of this case there is no difference between what has happened and what I am going to assume, that the case came on for trial, and at the trial the court came to the conclusion first that the plaintiffs' rights had been infringed, but secondly that having regard to the special circumstances of the case, the court in the exercise of its discretion would not grant an injunction, but would award damages. Now, supposing that that had happened, and that the costs of the motion had been, as they were in this case, reserved, it by no means necessarily follows that, because an injunction is not granted at the trial of the action, the interim injunction granted on the hearing of the motion was improperly A granted. The question to be determined on the motion was as to whether, pending the decision of what at that time was a disputed question—whether the plaintiffs' legal rights had been or would be infringed by what the defendants were doing—the matter should be kept *in statu quo*, and it by no means follows that matters ought not at that time to be B kept *in statu quo* pending the decision of that question of legal liability, because, when the legal liability has been established, the court, in the exercise of its discretion, thinks that no injunction should be granted. In my opinion, if that had taken place—that is to say, the interim injunction had been granted to restrain the defendants from continuing to C build at all pending the trial of the action, followed by a trial at which the infringement of the plaintiffs' rights had been established, but the court had in the exercise of its discretion awarded damages instead of an injunction—then the court ought, unless there are special circumstances in the case, to award to the plaintiffs the costs of the motion which had D been reserved, and ought not to grant any inquiry as to the damages sustained by the defendants by reason of the injunction which the plaintiffs ought to pay, because it ought to arrive at the conclusion that the injunction was properly granted. After all, it must be remembered, as was pointed out by Sir Wilfrid Greene, M.R., during the E argument, that the amount of the damages which are awarded in such a case may depend, and may depend quite largely, upon the fact that, pending the trial of the action between the issue of the writ and the trial, which may be an interval of a year or more, the plaintiffs have suffered no damage by reason of the existence of the injunction, and F their rights have not been affected in any way. One of the things to be taken into consideration by the judge in deciding whether a perpetual injunction should be granted at the trial or damages awarded, is the amount of damage sustained by the plaintiffs, and it may well be in certain cases that one of the reasons why a judge does not grant a per- G petual injunction at the trial is that, having regard to the interim injunction, the damages sustained by the plaintiffs are comparatively trivial, whereas they might not be trivial if no such injunction had been granted. That illustrates what I have ventured to point out already, that it by no means follows, because a perpetual injunction is not granted H at the trial, that the interim injunction should not have been granted on the hearing of the motion. On the contrary, I think as a general rule where at the hearing of the motion it appears that the plaintiffs' rights are being challenged by the defendants, unless the evidence is so conflicting that the court thinks an oral trial is the better remedy to be given to the plaintiffs, an injunction should be granted to restrain the defendants from interfering with the *status quo ante* pending the decision of the legal rights in the case, the position of the defendants, of course, always being amply secured, and the court must see that they are amply secured by the undertaking of the plaintiffs. I say that the court must see they are amply secured, because the court does regard the financial position of the plaintiffs before it grants an injunction; it always likes to be sure that the plaintiffs' undertaking in damages is one which will be effectual to indemnify the defendants if it turns out at the trial that the injunction was wrongly granted; that is to say, that the plaintiffs at that time had no legal rights.

In my opinion, as a matter of principle, and I think the judge decided this question as one of principle, the costs of the motion ought to have been the plaintiffs' costs, and there should have been no inquiry directed as to the damages sustained by reason of the defendants having given the undertaking which they gave on the hearing of the motion. I have nothing to add to what Sir Wilfrid Greene, M.R., has said as to the special circumstances that existed in this case arising out of that correspondence without prejudice which took place between the parties before the issue of the writ. I agree with the order which Sir Wilfrid Greene, M.R., has propounded.

MacKinnon, L.J.: I agree. If on Oct. 7 the defendants had said: "We admit the plaintiffs' claim, we are willing to pay damages, and we are willing to submit to an order for an inquiry as to those damages," and if the plaintiffs had then insisted on going on for trial claiming an injunction, there might have been a great deal to be said for Sir Herbert Cunliffe's contention as to both these matters. The truth is that at the date of the writ, Sept. 18, and on Oct. 7, and all the time until Nov. 4, the defendants were asserting, as is now admitted, wrongly, that they had not infringed the plaintiffs' rights at all. It was because of that wrongful assertion of the defendants that they had to give on Oct. 7 the undertaking not to hurry on with the building. They are now asking that the plaintiffs should pay damages under their cross-undertaking, and those damages were caused, if at all, solely by the defendants' own wrongful contention and attitude. In these circumstances, it appears to me to be ludicrous to suggest that the plaintiffs ought to pay any damages at all.

Order of Farwell, J., *of Nov.* 26, *discharged. Direction that plaintiffs' costs of the action, the costs of the motion being made costs in the cause, to be taxed, such costs not to include any costs incurred after payment in otherwise than for the purpose of the hearing before* Farwell, J., *on Nov.* 26. *Leave to appeal refused.*

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Ryland, Martineau & Co.*, Birmingham (for the appellants); *H. S. Wright & Webb* (for the defendants).

[*Reported by* Reginald Townsend, Esq., *Barrister-at-Law.*]

MOTOR TRADERS GUARANTEE CORPORATION, LTD. *v.* MIDLAND BANK, LTD.

[King's Bench Division (Goddard, J.), **October 14, 15, 1937.**]

Bankers—Crossed cheques—Third-party cheque indorsed by customer to himself—Forged indorsement—Extent of bank's inquiry—How far bank bound to observe its own regulations.

Turner, a motor trader in Bristol, had an account with the defendant bank. He induced the plaintiffs, a hire-purchase finance firm, to make out a cheque to W. & Co. for £189 5*s*., which cheque was crossed and marked not negotiable in print. Turner, having forged the indorsement of W. & Co. upon it, then added his own indorsement to it and paid it into his own account. The cashier asked Turner if he had obtained the cheque from W. & Co., to which question he replied in the affirmative. The cashier then inspected Turner's account and saw there were considerable dealings between him and W. & Co. Turner then volunteered the information that he had bought a car from W. & Co., and sold it to a customer of his, and mentioned a cheque for £484 10*s*. which had passed through his account in favour of W. & Co., and led the cashier to believe that a hire-purchase arrangement had been entered into with the plaintiffs in respect of a car bought from W. & Co. and sold to one of his customers. The defendant bank's regulations require such a cheque to be dealt with by the branch manager, and not by the cashier. The cheque was not brought to the branch manager's notice, nor did the cashier by inquiry discover, as the fact was, that many cheques drawn by Turner on his account had been dishonoured, or honoured only after repeated presentation. The bank made no inquiry of W. & Co. respecting the cheque. The plaintiffs sued the bank for the conversion of the cheque:—

Held: (i) a breach of the bank's own regulations was not conclusive proof that the cashier made insufficient inquiry, nor is a customer entitled to require literal performance of such regulations.

(ii) the past banking history of Turner was such that the bank should have made further inquiry, possibly by reference to the drawer or the payee of the cheque.

[EDITORIAL NOTE. This case differs rather from the earlier cases in which a bank has relied upon the Bills of Exchange Act, 1882, s. 82, in that the question for decision is not whether the bank were in the circumstances put upon inquiry, but whether the inquiries they made were sufficient to discharge the onus placed upon them. It would seem that such inquiries must extend to the past banking history of the customer, at any rate so far as it is known to the branch at which the account is kept. The case also considers the question of whether the bank are bound to observe their own regulations applicable to the case, upon which it is said that the sufficiency of the inquiry must be determined without reference to a literal observance of such regulations; but a departure therefrom is necessarily strong evidence of negligence in the matter.

As to Conditions of Bank's Protection, see HALSBURY, Hailsham Edn., Vol. 1, pp. 809-812, para. 1330; and for Cases, see DIGEST, Vol. 3, pp. 240-242, Nos. 681-692.]

Action for damages in respect of the conversion of a cheque, crossed and marked "not negotiable" in print, the indorsement of which was forged. The defendants claimed the protection of the Bills of Exchange Act, 1882, s. 82. The facts are fully stated in the judgment.

H. U. Willink, K.C., and *C. L. Henderson* for the plaintiffs.

F. J. Tucker, K.C., and *Kenelm Preedy* for the defendants.

GODDARD, J.: This is an action brought by the Motor Traders Guarantee Corpn., Ltd., against the Midland Bank, Ltd., claiming damages in respect of the conversion of a cheque. The real question in the case is the familiar question which arises when a bank claims the protection of the Bills of Exchange Act, 1882, s. 82, as to whether or not, in dealing with a third-party cheque, as it is called, the bank have acted with due regard to the interests of the true owner. The facts in this case are a little unusual. There have been a great many cases decided under the section, and a great many cases decided in quite recent years. This case rather stands by itself, because, according to my recollections of the cases, I think that in every case the question which has been raised has been whether the circumstances of the transaction were such as to put the bank on inquiry. In this case, it is unnecessary really to consider whether the circumstances were such as to put the bank on inquiry, though I think that, on the whole, they were, because inquiry was in fact made by the cashier, and the real question in the case, I think, is whether or not he made a sufficient inquiry, or whether he ought to have been satisfied without further inquiry, in view of the story which was told to him, and in view also of the fact that he knew the antecedents of the customer. I do not mind stating at once that my mind has fluctuated considerably in the course of the argument, and, had it not been for what, at a very late stage in the case, no doubt by an oversight, was disclosed, namely, the family history of the person in question, a man of the name of Turner, I think it is quite likely that my judgment might have been different.

The facts in the case are these. The bank have a branch at Staple Hill, Bristol, and a customer of the name of Turner, who was carrying on a motor business. It could not have been a large motor business; I do not suppose that it was considered by the bank to be a large business. Turner was introduced to them in January by Mr. Pride. Mr. Pride was a gentleman holding a high position with the General Accident, Fire & Life Assurance Co., Ltd., in Bristol, and the plaintiffs, the Motor Traders Guarantee Corpn., Ltd., are a subsidiary of the General Accident, Fire & Life Assurance Co., Ltd., and had what is generally known as a hire-purchase finance business. That business is well-understood, and has been the subject of many cases in the courts. If a customer wants to buy a care on hire purchase, he goes to a dealer, with whom he arranges the terms as to the price of the car, the instalments to be paid, the allowance to be made for any other car, and so forth. The dealer, wanting his money, and not wanting to be out of his money during the period of the hire purchase, enters into an arrangement with the hire-purchase finance corporation by which the financier buys the car from the motor trader and lets it on hire to the customer. It would appear likely from the account of Mr. Turner, as there are various entries showing dealings with the Motor Traders Guarantee Corpn., Ltd.—I say only that it appears likely, because there has been no definite evidence upon the point—it appears that, in July, 1936, Mr. Turner, by some story which he told to the Motor Traders Guarantee Corpn., Ltd., induced them to make out a cheque for £189 5*s.* to Messrs. Welsh & Co. Messrs. Welsh & Co. are large distributors of, and dealers in, cars at Bristol, and it is only fair, especially to the cashier in this case, to say that they are in an entirely different part of Bristol ; they are down in Bristol A City, some 3 or 4 miles away from Staple Hill, and Mr. Hatherell, the cashier who dealt with this matter at the bank, and who lived at Bath, had no particular knowledge of Messrs. Welsh & Co., although he knew that they were motor dealers in Bristol, but he did not know whether they were big or small, or really anything about them. This cheque, as B I have said, was obtained by Turner on the representation that it was to buy a car from Messrs. Welsh & Co., which in turn would be let on hire purchase by the plaintiffs to him, Turner ; and it is quite clear—and here I think it is only fair to the cashier to say—that the Motor Traders Guarantee Corpn., Ltd., appear to have had just as much trust in Turner C as the people at the bank had. As a matter of moral blame in this matter, it seems to me that the Motor Traders Guarantee Corpn., Ltd., were every bit as much to blame—if there is blame in the matter at all—for trusting this man with the cheque as were the bank for paying it. The fact was that both the Motor Traders Guarantee Corpn., Ltd., D and the bank regarded Turner as an honest man. Turner, however, was not an honest man ; at the moment—I shall have to deal with the bank account more in detail—when he received this cheque, he was in debit to the extent of £7 8*s.* 3*d.* He had no arrangement with the bank to overdraw. There were becoming due, apparently, some obligations E which he had not the means to meet, because one notices that on July 3 cheques were presented by a man named Brown for nearly £100, and one by another concern for £17 14*s.* 9*d.*, and he also required cash, perhaps for wages or current expenses of £50, and none of that money would have been forthcoming from the bank if he had not been able F to pay in some large credit on that date. Of course, the bank cashier would not know what cheques were coming in, but Turner knew what his position was. He took this cheque ; he forged Messrs. Welsh & Co.'s signature ; he took the cheque to the bank and paid it in there, representing that it was a cheque which had been negotiated to him. G Of course, in the first instance, it is not usual for traders to indorse cheques over from one trader to another in the way in which this was apparently done. I think that it probably struck Mr. Hatherell that that was a matter to be inquired into, and Mr. Hatherell also made inquiries because there are very definite rules laid down by the bank and H circulated to their branch managers, who are told to make their cashiers acquainted with those regulations with regard to dealing with third-party cheques, as they are called in this case—that is to say, a cheque not made payable to the customer, but apparently indorsed over to him. The cheque in this case, I should say, was indorsed quite generally ;

it was not indorsed specially. It did not purport to be indorsed specially to Turner; it was indorsed by Welsh & Co., and Turner added his own indorsement to it, as the customer of the bank which he was requesting to clear the cheque. Mr. Hatherell took the cheque, and, seeing that it was what is called a third-party cheque, he asked the A question, which, of course, on this, was not a very valuable question to ask, but it was by way of opening the inquiry: "Did you get this cheque from Messrs. Welsh & Co.?" The answer was, "Yes." It does not follow that the answer would not have been "Yes," because it might have been that Messrs. Welsh & Co., if it had been a genuine B transaction, had indorsed the cheque to someone who could not have handed it over to Turner, but Turner said it had been indorsed to him by Messrs. Welsh & Co. Thereupon, Mr. Hatherell went and looked at the account, and I think that that was a prudent thing to do, and a thing which one would expect a careful cashier to do. What he saw C was that there had been quite substantial dealings on about three occasions—when I say "substantial dealings," I mean dealings involving substantial sums of money—between Messrs. Welsh & Co. and Turner, and he said that he had not the slightest suspicion of Turner being other than an honest man; he was quite satisfied about his honesty, and D he apparently was prepared to accept the cheque on that. All I can say is that, if Mr. Hatherell was put on inquiry by this cheque, as I think he was, by reason of one trader bringing in another trader's cheque, there were circumstances here, having regard also to the amount of the cheque, which ought to put a banker on inquiry. I am bound to say E that I should not hold that Mr. Hatherell made enough inquiry, but, before he had actually accepted the cheque for collection, and while the man Turner was still in the bank, Turner gave him further information. He said that he had sold a car which had been supplied by Messrs. Welsh & Co.; in other words, he had got the car from Messrs. Welsh & F Co. and had sold it to a customer of his. Turner said that he had paid Messrs. Welsh & Co., and he called attention to a very considerable cheque which had passed through the account in favour of Messrs. Welsh & Co. on June 25 for £484 10*s*., and he said that that cheque which he paid to Messrs. Welsh & Co. was a cheque included in the price G of this car, which was represented by the sum of £189 5*s*. It was said that it led Mr. Hatherell to understand, and that Mr. Hatherell did understand (and I think, on the whole, that it was not unreasonable for him to understand), that a hire-purchase arrangement had been entered into, or was about to be entered into, with the plaintiffs; that they made H out their cheque to Welsh & Co.; in other words, they were buying a car from Welsh & Co., and were going to let it on hire purchase direct to Turner's customer, and, therefore, if this cheque was paid to Welsh & Co., Welsh & Co. would be paid twice over, and so Welsh & Co. just indorsed the cheque over to him. If Turner was a man whose business antecedents were thoroughly satisfactory, I must say I should have hesitated long before I should have held that Mr. Hatherell had not made enough inquiry, and that he had not had told to him a story which any reasonable man, believing his customer to be thoroughly honest, might not have accepted.

It is is not necessary, I think, to go at any length through the large number of cases which is always cited on these occasions. The principles which are laid down in those cases depend, I think, very much upon what are the circumstances which are enough to put a bank on inquiry. As to whether or not the bank or its officers exercised due care in any particular case, that must depend upon the facts of the particular case. One point in this case which Mr. Willink has stressed, and has stressed very strongly, is that the bank's own regulations provide that these matters are to be dealt with by the manager. They do not say so quite in those terms, but the regulations say that the manager must see that cashiers are fully instructed regarding the danger of receiving third-party cheques for credit or exchange. This is not a regulation treating managers and cashiers, so to speak, as one and the same; it is distinguishing between the manager and the cashier. The manager is to instruct the cashier as to the dangers, and as to his duties, in relation to third-party cheques. Then it says:

> Extreme caution must be exercised in all cases where a customer tenders for credit or exchange a cheque payable to a third party, and such cheques should not be dealt with unless the manager is fully satisfied that the customer is entitled to deal with the article in the proposed manner. . . . Where a branch receives cheques payable to third parties for the credit of a customer at another branch, unless the branch manager is satisfied that the cheques can be properly dealt with in the proposed manner, it is advisable to delete such cheques from the credit note and counterfoil and send them to the customer's branch to be dealt with.

Then there are other directions given, but it is quite clear, so far as the bank are concerned, that the bank put upon the manager the duty of deciding whether a third-party cheque should properly be taken into the credit of the bank's customer. The regulations between the bank and the customer do not strictly concern the plaintiffs. The bank are not owing a duty as bankers to the plaintiffs except in so far as, under sect. 82 of the Act, in order to escape a liability in conversion, they have to show that they have acted with due regard to the interests of the true owner of the cheque. But it is said, and said with great force, by Mr. Willink, that, if he shows that the officers of the bank did not obey their own regulations, he goes a very long way to establishing a case of negligence. I think it cannot be taken always as a universal principle, because, if the facts showed that the bank cashier had taken every reasonable precaution to satisfy himself, and that he was satisfied with the information he had got, and that the conclusion which he had been able to draw from that information was such as would satisfy anyone that the bank might safely and properly take that cheque, I do not see how it can be said that, because he had not followed out to the letter the regulations of the bank, because he had not submitted it to the manager's attention directly, the bank would have been guilty

of negligence. The bank could not have been guilty of negligence if their servant, whether the cashier or manager, had taken all reasonable precaution. But for one fact in this case, I think I should have held that Mr. Hatherell had made reasonable inquiries. He had checked up the account, he had heard the man's explanation, a man whose honesty
A he did not doubt, and I think I should probably have held that the bank had discharged the onus which was upon them. But the difficulty in this case, from the point of view of the bank, is that it may be that Mr. Hatherell—I do not doubt for a moment that it was so—did not suspect Turner's honesty, but it is a little difficult to say that Turner
B was a man whose banking record was so satisfactory that Mr. Hatherell was entitled to take upon himself the duty of deciding whether or not this cheque should be accepted, because, though it was not known until this case had been opened, and some way through, that between Jan., 1936, when the account was opened, and July 1, 1936, 35 cheques (I
C think it was) of varying amounts, and some for very considerable amounts, had been returned dishonoured by the bank. Some of them were subsequently paid. Others, and others to a considerable amount, had not been paid, and it was quite obvious that Turner was a man who was in the habit—I think one may say in the habit, in view of all these dishonoured
D cheques—of drawing cheques, and drawing trade cheques, because it is quite clear that some of these were trade cheques, for amounts which, when the cheques were presented, he had not assets to meet. Although his account was an active account, and although it never actually went into debit to any great extent, quite clearly the reason why it did not
E get into debit to any considerable extent was because the bank were not paying cheques except against assets which they had in their hands, and they were not granting him any banking accommodation at all. I think that could hardly have been in Mr. Hatherell's mind. He could not have referred—I am not saying he is bound to refer to one book or
F to another—but when he was allowing himself to be satisfied of the honesty of Turner he certainly had not in his mind, I think (for if he had I should be somewhat surprised that he acted as he did), a very large number of cheques, and drawn for very considerable amounts, which had been returned from time to time. It is quite true, and I do not overlook
G the fact, that many of these cheques which were returned were presented more than once. Many cheques seem to have been presented three times before they were met, and some cheques were presented quite a number of times, and did not get honoured at all. That seems to me to put a different complexion on this case, because, in those
H circumstances, it does seem to me that Mr. Hatherell ought not to have taken upon himself the responsibility of accepting that cheque.

I think that this is exactly the class of case which ought to have been referred to the manager. It is no good speculating on what view the manager would have taken, or what steps would have been taken, because the matter was never submitted to him. Here was a man whose cheques were constantly coming back because there were not enough assets to meet them; he had run down from £503 in June, quite quickly, by drawing a large cheque to Welsh & Co. for £484, so that his account was rapidly run down from being £500 in credit to being £7 8*s.* 3*d.* overdrawn, with no arrangement to overdraw at all. Then comes along this cheque, which is not an ordinary cheque, in the sense that it is not A a cheque drawn payable to him; it is a cheque drawn to another person, a person unknown to the bank, but a person who was known to be in Bristol. Before the cheque was put through for clearing, I should have thought it would have been quite simple to have rung up and asked if the cheque was in order, or to have asked the drawers of the B cheque whether it was in order. An inquiry might have been made of Messrs. Welsh & Co. I am far from saying, and I do not intend to lay down until there is some authority which compels me to so hold, that it can be stated that there is an absolute duty upon a banker, even where he is put on inquiry, to inquire of the payee of the C cheque or of the drawer of the cheque. The circumstances may be such that that is the only course that he can take to get satisfactory information. What I mean to say is that it would be going too far to hold that in every case a banker can discharge the onus which is upon him, if he wishes to take the protection of sect. 82, only by showing that he has D inquired of one or other of these people. It may very well be that, in certain cases, the information that he gets is enough, and, as I have already said, I think that, if Turner's banking history had been different from what it is now shown to have been, I should have been inclined to hold, and I think that I probably should have held, that the inquiries E which were made by Mr. Hatherell were enough. But with a man who had this history of dishonoured cheques, and dishonoured cheques for considerable sums, I think it is obvious that Mr. Hatherell should have consulted the manager, which is the course of conduct which the bank regulations set out. I again say that I am far from saying that the F plaintiffs, or any other person whose property has been converted, are entitled to rely upon a literal performance, or are entitled to require a literal performance, by the bank of these regulations. The bank does not owe a duty to them to carry out this rule, that rule, or the other rule. Indeed, I doubt whether they owe their own customers the duty G of carrying out all the rules which they may lay down as counsels of perfection. The question in every case is not whether the bank require a particular standard of conduct, but whether the particular acts which are done are enough to discharge the onus which is upon the bank either in respect of their own customer or in respect of some other customer. H In this case it seems to me that Mr. Hatherell, if he had in mind, as he probably had not, the somewhat remarkable banking history of Turner, ought to have referred the matter to the manager. I am by no means satisfied that a manager, or an ordinary careful cashier with a knowledge of Turner's banking history in his mind, would have allowed this cheque to be collected and placed to the credit of Turner without some further inquiry. It is for that reason, and for that reason alone, I may say, that I think the bank fail to discharge the onus which was placed upon them. It is quite clear that their own regulation was not followed, and the circumstances show, I think, that it was a case in which the regulations ought to have been followed. In the circumstances, it seems to me that the bank have failed to discharge the onus which sect. 82 places upon them, and that, therefore, there must be judgment for the plaintiffs for the amount claimed, with costs.

Judgment for the plaintiffs for £189 5*s. and interest at* 4 *per cent. from July* 1, 1936.

Solicitors: *Dennes & Co.*, agents for *Latchams & Montague*, Bristol (for the plaintiffs); *Coward, Chance & Co.* (for the defendants).

[*Reported by* C. St. J. Nicholson, Esq., *Barrister-at-Law.*]

KEVORKIAN *v.* BURNEY.

[Court of Appeal (Greer and Scott, L.JJ.), **October 18, 1937.**]

Practice—Interlocutory order—Leave to appeal—Extension of time—Plaintiff in America—R.S.C., Ord. 58, *r.* 15—*R.S.C., Ord.* 64, *r.* 7.

The appellant was in America at the time when an interlocutory order was made. This order was made shortly before the beginning of the long vacation, and at that time no leave to appeal was sought. By the beginning of the following term, instructions had been received from the appellant, and this application was made for an extension of time within which to appeal, and for leave to appeal:—

Held: in the circumstances of this case, it would be a denial of justice to the appellant if the time for appeal was not extended, and it ought, therefore, to be extended.

Selwyn (A. H.), Ltd. v. *Baker* (5) *commented on.*

[EDITORIAL NOTE. It had always been thought that the remarks of Sir Ernest Pollock, M.R., in *Selwyn* v. *Baker* (5) would not have been made had the attention of the court been drawn to *Baker* v. *Faber* (4) and the alteration made in the rules in 1909. The Court of Appeal here confirms this opinion, and the case of *Selwyn* v. *Baker* must now be read in the light of the comments made herein.

As to Extension of Time for Appeal, see HALSBURY, Hailsham Edn., Vol. 26, pp. 116-118, paras. 229, 230; and for Cases, see DIGEST, Practice, pp. 805-807, Nos. 3682-3698. See, also, YEARLY SUPREME COURT PRACTICE, 1937, pp. 1271-1279.]

Cases referred to:

(1) *Re Coles & Ravenshear*, [1907] 1 K.B. 1; Digest, Practice, 806, *3688*; 76 L.J.K.B. 27; 95 L.T. 750.

(2) *Re Helsby, Ex p. Trustee*, [1894] 1 Q.B. 742; 4 Digest 529, *4850*; 63 L.J.Q.B. 265; 70 L.T. 144.

(3) *Re Manchester Economic Building Society* (1883), 24 Ch. D. 488; Digest, Practice, 806, *3685*; 53 L.J.Ch. 115; 49 L.T. 793.

(4) *Baker* v. *Faber*, [1908] W.N. 9; Digest, Practice, 806, *3690*.

(5) *Selwyn (A. H.), Ltd.* v. *Baker*, [1924] W.N. 195; Digest, Practice, 806, *3692*.

Application for leave to appeal notwithstanding the fact that time for appealing had expired. The facts supporting the application appear fully in the judgment.

W. Arthian Davies for the appellant.

Hon. Quintin M. Hogg for the respondent.

A

Greer, L.J.: This is a two-fold application, first for extension of time to appeal to this court against the refusal to extend time by the judge, and secondly for leave to appeal. In this case, an interlocutory order was made very near the beginning of the long vacation, and I agree with what has been said by counsel for the appellant, that he was not called B upon at that time to ask for leave to appeal, or to ask for extension of time, without his first having had an opportunity of communicating with his client, who was abroad, and of obtaining his instructions with regard to the matter. In these circumstances, I think that the authorities which have been referred to by Mr. Hogg in his clear and able C argument do not apply to the facts of this particular case. In my judgment, it would be a denial of justice to the plaintiff not to extend his time for presenting his appeal to this court, and to refuse him leave to appeal. There appears to me to be some substance in his grounds of appeal, and there seems to me to be quite a reasonable explanation as D to why there has been the delay which necessitated this application. No leave was asked for, and no extension of time was asked for, when the application was heard just before the end of the term, but it was quite right for counsel for the plaintiff first of all to communicate with his client, who was abroad, before he took upon himself the responsibility E of asking for either leave to appeal or an extension of time.

I note that in *Re Coles & Ravenshear* (1), Sir R. Henn Collins, M.R., used these words, at p. 4:

> I confess that, if the case were free from authority, and I felt myself at liberty to follow my own judgment in the matter, I should unhesitatingly allow the time F to be extended.

He went into the authorities, and found that, on the authorities as they then stood, and on the rules and practice as they then stood, he could not do what he felt, in his own judgment, he would unhesitatingly do in the absence of those authorities, especially the case G of *Re Helsby, Ex p. Trustee* (2). The same view seems to have been expressed by Bowen, L.J., in *Re Manchester Economic Building Society* (3), and there are later cases in which, notwithstanding these authorities, leave has been given in cases where it was thought by the Court of Appeal right and proper that leave should be given, and in *Baker* v. *Faber* (4) H the court intimated that the attention of the Rules Committee should be called to the rules as they then existed, and the rule was then altered to its present form. It is quite true that in a later case Swinfen Eady, L.J., in the Court of Appeal—and I think the other members agreed with him—said that it did not necessarily follow that, in all

cases where a mistake had occurred, the effect of the earlier authorities had been done away with by reason of the alteration of the rules. This, however, is not a case of mistake, but a case of a difficulty occasioned by the date on which the trial came on, and by the necessity for communicating with the plaintiff, who was abroad, before doing a thing which
A ought not to be done without the instructions of the client. As I have said, a letter was written to the client, but it takes some time for a letter to reach America, notwithstanding the increase in the speed of passage to that country, and it was necessary, in my judgment, that the matter should be explained by letter; it could not satisfactorily be explained
B by cablegram.

In these circumstances, it seems to me that it would be unjust to the plaintiff if we did not exercise the discretion which I think we have in the circumstances of this case, and enlarge the time to appeal, and give leave to appeal. The appeal succeeds, but, inasmuch as there has
C been, possibly, more delay in making the application than there might have been, the appeal is allowed without costs.

SCOTT, L.J.: I agree, and would like to add only this observation upon *Selwyn* (*A. H.*), *Ltd.* v. *Baker* (5), to which Mr. Quintin Hogg
D referred us, by leave, after Mr. Davies' reply. In that case, the court, consisting of SIR ERNEST POLLOCK, M.R., WARRINGTON and SARGANT, L.JJ., upheld a preliminary objection similar to Mr. Hogg's objection here, that the appeal was out of time, and that the decision in 1907 in *Re Coles & Ravenshear* (1) still governed the Court of Appeal. The
E court accordingly followed that decision, and refused an extension of time, but I notice that the change in the form of the rule and the subsequent decision reported in the *Weekly Notes* of 1908 were neither of them drawn to the attention of the court, and I cannot help feeling that, had the court had its attention directed to those cases, the very important
F change in the position caused by the change in the form of the rule would have led to a different decision of this court.

Appeal allowed without costs. Time for appeal extended to 7 days from date of application.

Solicitors: *Cardew Smith & Ross* (for the appellant); *Jacobson,*
G *Ridley & Co.* (for the respondent).

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

R. *v.* BOSELEY.

[Court of Criminal Appeal (Lord Hewart, L.C.J., Humphreys and du Parcq, JJ.), **October 19, 1937.]**

Criminal Law—Appeal—Certificate for appeal—Mere possibility of injustice—Whether certificate ought to be granted.

After a trial at quarter sessions, the recorder granted a certificate, upon counsel submitting that he desired to argue the accuracy of the direction to the jury on one part of the case. The recorder stated that he adhered to his direction and granted the certificate merely to obviate any injustice:—

Held: such certificate was wrongly granted. The convicted person was entitled to make an application to the Court of Criminal Appeal for leave to appeal, and there was no possibility of injustice.

[**EDITORIAL NOTE.** In this case, the Court of Criminal Appeal repeat that the granting of a certificate merely to obviate a possibility of injustice is improper, as it entails considerable public expense, and the prisoner's rights are amply safeguarded by his right to come to the Court of Criminal Appeal and ask for leave to appeal.

As to Granting Certificate for Appeal, see HALSBURY, Hailsham Edn., Vol. 9, p. 264, para. 375; and for Cases, see DIGEST, Vol. 14, p. 503, No. 5528.]

Cases referred to:

(1) *R.* v. *Langley* (1923), 17 Cr. App. Rep. 199; 14 Digest 503, *5528*.

(2) *R.* v. *Parkin* (1928), 20 Cr. App. Rep. 173; Digest Supp.

Appeal from a conviction at Maidstone Borough Sessions upon three charges of fraudulent conversion. The case is reported only upon the question of when a certificate for appeal should be granted.

E. V. White for the appellant.

Colin H. Pearson for the Crown.

The judgment of the court was delivered by Humphreys, J.

Humphreys, J.: This appellant, William Alfred Boseley, was convicted at the Maidstone Borough Sessions. The court was presided over by the recorder. The appellant was convicted on three charges of fraudulent conversion, as it is commonly called, and he was sentenced to 12 months' imprisonment in the second division. He now asks to have the conviction quashed, and he does not complain of the sentence. A certificate was granted by the recorder, thus enabling the appellant to appeal without applying for leave to appeal, and necessitating the presence of the prosecution on the appeal. The ground upon which the recorder granted his certificate is this:

> That counsel for the accused submitted to me that he desired to argue whether I had correctly directed the jury on what constituted "fraud" in the circumstances.

There then follows a second point, which has not been referred to. He continues:

> In these circumstances, whilst I adhere to the direction I gave the jury on the first point and consider the second point irrelevant, I thought it better, to obviate any possibility of injustice, to give leave to appeal against conviction.

In these circumstances, it seems desirable to repeat some observations of LORD HEWART, L.C.J., in giving judgment in this court in 1923 in *R.* v. *Langley* (1). LORD HEWART, L.C.J., there observed, at p. 200 :

> It is clear that the learned recorder was not of opinion that it was a case for a certificate, and he said that he only granted it because counsel asked for it. In view of his opinion and his ruling that there was evidence of larceny, which ruling this court thinks was quite correct, it is a little puzzling to know why the certificate was granted. It is a departure from the ordinary practice, and if continued would result in a great increase of such cases, and considerable expense would be incurred, as in such cases the prosecution must be represented here, which would mean a great waste of public money.

In a subsequent case, *R.* v. *Parkin* (2), he added that the mere fact that counsel was pressing for a certificate was not a ground for the grant of a certificate.

In this case, it does not appear that there took place with the recorder any discussion upon what constituted fraud. There was some question as to whether he had properly directed the jury on what constituted fraudulent conversion. However that may be, the court thinks that it should repeat what I have quoted. The court thinks that here there was no possibility of any injustice, as people who are convicted are entitled to come to this court and ask for leave to appeal, and, if there is any point, leave to appeal will be granted without a certificate.

Solicitors : *Registrar of the Court of Criminal Appeal* (for the appellant) ; *Director of Public Prosecutions* (for the Crown).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

SPITTLE *v.* THAMES GRIT & AGGREGATES, LTD.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Humphreys and du Parcq, JJ.), **October 20, 1937.**]

Street Traffic—Licensing of goods vehicles—Private carrier's licence—" C " licence—Whether vehicle used for carriage of goods for hire or reward—Road and Rail Traffic Act, 1933 (*c.* 53), *ss.* 1 (5) (*a*), 9 (1).

The respondents, as holders of a private " C " carrier's licence, were charged with having failed to comply with a condition attached to the licence, namely, that " the holder of this licence is entitled to use the authorised vehicles for the carriage of goods for or in connection with any trade or business carried on by him, but no vehicle which is for the time being an authorised vehicle shall be used for the carriage of goods for hire or reward," contrary to the Road and Rail Traffic Act, 1933, s. 9 (1). The vehicles in question were used for the removal and disposal of the whole of the surplus excavations from the site of a new railway station, for the sum of 1*s.* 10*d.* per cubic yard of excavation, and it was alleged that the consideration paid, or some part of it, was paid for the carriage of the rubbish. The justices dismissed the charge, holding that the property in the rubbish passed to the respondents the moment it was loaded on to the vehicle, and that it could not be said that a person had carried his own goods for hire or reward :—

HELD : (i) a large part of the payment recovered by the respondents was paid for the carriage of the rubbish from the premises of the railway, and the offence charged was proved.

(ii) this was not a case of " delivery or collection by a person of goods sold, used or let on hire or hire purchase in the course of a trade or business carried on by him" within the meaning of sect. 1 (5) (*a*) of the Act of 1933.

[EDITORIAL NOTE. The "C" licence in general terms authorises the use of a motor goods vehicle by a trader in his own business. In the present case there was a lump sum payment for the removal and disposal of excavated soil, and it was urged that the soil, as soon as it was loaded, became the property of the contractor, and that he was carrying goods in the course of his own business, and not for hire and reward. The court rejected this view, regarding the payment as divisible, and a definite part as being paid for the carriage of the rubbish to the place of deposit. A

As to Licensing Goods Vehicles, see HALSBURY, Street and Aerial Traffic, Supp. to Vol. 27, para. 562; and for Cases, see DIGEST, Supp., Carriers, Nos. 1474-1601.] B

Appeal by way of case stated from a decision of justices for the petty sessional division of Slough, Buckinghamshire. The facts and the arguments are set out in the judgments.

Road and Rail Traffic Act, 1933, provides as follows: C

> 1 (5). For the purposes of this part of this Act (*a*) the delivery or collection by a person of goods sold, used or let on hire or hire purchase in the course of a trade or business carried on by him . . . shall not be deemed to constitute a carrying of the goods for hire or reward.
>
> 9 (1). Subject to the provisions of this section, any person who fails to comply with any condition of a licence held by him, shall be guilty of an offence under this part of this Act. D
>
> (2). Notwithstanding that a vehicle is an authorised vehicle, the conditions of the licence shall not apply while the vehicle is being used for any purpose for which it might lawfully be used without the authority of a licence.

Valentine Holmes for the appellant.

Philip Vos, K.C., and *C. H. Morgan* for the respondents.

E

Lord Hewart, L.C.J.: This case arises out of an information preferred by the appellant, a traffic examiner, against the respondents, for that they, on a certain day in November last, being the holders of a private "C" carrier's licence authorising the use of a particular vehicle, had failed to comply with the following condition attached to the licence: F

> The holder of this licence is entitled to use the authorised vehicles for the carriage of goods for or in connection with any trade or business carried on by him, but no vehicle which is for the time being an authorised vehicle shall be used for the carriage of goods for hire or reward

contrary to the Road and Rail Traffic Act, 1933, s. 9 (1). The justices, having heard the evidence, dismissed the information. The question G for us is whether, in so doing, they came to a correct determination in point of law.

The facts of the case are perfectly simple. The respondents are the owners of 90 per cent. of the issued capital of another company called the Ham River Grit Co., Ltd. On Oct. 2, 1936, that company had H entered into a written agreement with a firm of contractors to remove and dispose of the whole of the surplus excavations excavated by the contractors from the site of a new Metropolitan Railway station at Uxbridge, for the sum of 1*s.* 10*d.* per cubic yard of excavation. Shortly before Oct. 7, that subsidiary company came to an arrangement, as it is called, with another company, Sandstone Pits (Uxbridge), Ltd., whereby the subsidiary company, to all intents and purposes the present respondents, in consideration of the sum of £100 to be paid to Sandstone Pits (Uxbridge), Ltd., were given facilities for tipping the surplus excavations into disused gravel pits. Accordingly, on Nov. 4, 1936, a number A of motor vehicles, including the goods vehicle referred to, arrived at the pits and discharged their loads. The vehicles were laden with rubbish, consisting of surplus excavations which had been removed. The current record which the driver of the goods vehicle had to keep showed that, at the time referred to, he was engaged in carrying a load of muck from B the site at Uxbridge to the pits, and that he had already carried two other loads of muck on the same journey on the same day. On those materials, the appellant contended that the goods vehicle was being used for the carriage of goods for hire or reward ; that it was immaterial whether the property in the rubbish carried had or had not vested in C the respondents when loaded on to the vehicles ; that the respondents were paid by the contractors for " the removal and the disposal " of the rubbish ; that the consideration paid by the contractors to the respondents, or some part of it, was paid for the carriage of the rubbish ; and that a person receiving payment for the carriage of goods in a goods D vehicle carried the same for hire or reward unless he could show that he came within the provisions of an earlier section, which section it was contended had no application to the present case. The respondents contended, and in a somewhat remarkable way contended with success, that no offence had been committed, because the property in the rubbish E passed to the respondents as soon as it was loaded on their lorries. The justices formed the opinion that the property in the rubbish passed to the respondents the moment it was loaded on to the vehicle, and that the respondents could not be held to have carried their own goods for hire or reward.

F In my opinion, the case is really too clear for argument. The respondents say they did not use a private carrier's licence, which is a " C " licence, for the carriage of goods for hire or reward, because, under this contract, the respondents were to dispose of the stuff they took away when they had carried it away from the premises of the other G contracting party. It was said that that was not the carriage of goods for hire or reward. The argument apparently is that, in order to find carriage of goods for hire or reward within the meaning of sect. 2 (4) of the Act of 1933, they must be able to point to a contract the whole and sole purpose of which is confined to the carriage of goods. In my opinion, H it was perfectly obvious that those goods were being carried for hire, to wit, the purchase money, or a large part of the payment, in this written contract. The justices seem to have been led astray by the ingenious use of a portion of sect. 1 (5) of the Act, that subsection providing that certain things therein shall not be deemed to constitute a carrying of the goods for hire or reward. That is referring to various incidental matters where the man does certain things in connection with his own business. The particular one that was relied on, and, strange to say, was relied upon with success, was that it is not to be deemed to constitute carriage of the goods for hire or reward if it is:

> the delivery or collection by a person of goods sold, used or let on hire or hire purchase in the course of a trade or business carried on by him. A

I suppose it was suggested that this spoil or muck was used in the course of a business carried on by the respondents, the argument being presumably this: We did not have to take this stuff to a place named and leave it there; we could have used it for what purpose we liked; we could have paid somebody £100 to let us tip it into a disused pit, or we might have B
used it for some other purpose. That is the kind of desperate argument that is used to cover up a hopeless position. It is quite obvious that a large part of this payment recovered by the respondents under the contract was paid for the carriage of this useless material from the premises of the railway, or what was going to be a railway. I think C
that the contentions of the appellant were right, that there were really no materials upon which the justices could come to the conclusion which they formed.

I think, therefore, that the appeal ought to be allowed, and the case should go back to the justices with the direction that the offence which D
was charged was proved.

Humphreys, J.: I agree, and I also think that this is a very clear case. What the licence which was held by the respondents permitted them to do was to use the vehicle in connection with their trade or E
business, subject to this condition, that no vehicle being an authorised vehicle shall be used for the carriage of goods for hire or reward. If, on the facts which appear in this case, and which have been referred to by Lord Hewart, L.C.J., in his judgment, there was not a carrying of goods for hire or reward, one asks oneself, what was the payment made F
for? It is quite clear that the respondents were paid a substantial sum of money for something. They were not paid the sum of money because the goods were sold to them, or the payment would have been in the opposite direction. They were paid, as the case finds, for removing those useless goods, that useless and valueless material, to any place where G
they chose to take it. That appears to me to be the simplest possible case of using the vehicle for the carriage of goods for hire or reward. Then Mr. Vos says: "But look at sect. 1 (5). That enables us to say that what we were doing shall not be deemed to constitute a carrying of the goods for hire or reward." It would be indeed odd if the statute H
in sect. 1 had inserted a provision which made absolute nonsense of the provision to be found in sect. 2 of the Act, with regard to class "C" licences. The answer seems to be that the facts of this case do not bring the respondents within the terms of subsect. (5). Subsect. (5) allows the delivery or collection by a person of goods which are sold in

the course of his trade or business. It is quite clear that that does not apply to this. Then it says "let on hire or hire purchase" by him. It is clear that does not apply. It also says "or used," and it is the word "used" which Mr. Vos relies upon. One wants only to look at the facts to see here whether this useless and valueless rubbish was used by the respondents in the course of their trade or business. The answer is that they paid somebody £100 to let them get rid of it. That is all they did. They took something that was valueless from A., and they were paid a sum which made it worth while to pay somebody else £100 to let them get rid of it. That is called using it in the course of their trade or business.

I agree in the result proposed by LORD HEWART, L.C.J.

DU PARCQ, J.: I am of the same opinion, for the reasons which have been given by LORD HEWART, L.C.J., and by HUMPHREYS, J.

Appeal allowed and case remitted to justices with the direction that the offence charged was proved.

Solicitors: *Treasury Solicitor* (for the appellant); *William Charles Crocker* (for the respondents).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

R. *v.* SUSSEX CONFIRMING AUTHORITY, *Ex parte* TAMPLIN & SONS' BREWERY (BRIGHTON), LTD.

[King's Bench Division (Lord Hewart, L.C.J., Humphreys and du Parcq., JJ.), **October 21, 1937.**]

Intoxicating Liquors—Licensing—Publican's licence—Condition attached by justices—Restriction of sale to a limited class—Validity—Licensing (Consolidation) Act, 1910 (*c.* 24), *s.* 14 (1).

The licensing justices confirmed the grant of a licence for the sale by retail of any intoxicating liquor which might be sold under a spirit retailer's (or publican's) licence for consumption either on or off the premises, subject to certain conditions, one of which was in the following terms: "There shall be no sale on the premises to any person other than travellers who hold current tickets issued by Southdown Motor Services, Ltd.," who were the owners of the premises in respect of which the licence was granted. Objection was taken, on the ground that a condition could not be attached to a justices' licence whereby the licensee was prohibited from serving intoxicating liquor to any but members of a limited class, and that, therefore, in imposing such a condition, the confirming authority was acting without jurisdiction:—

Held: (i) there was no excess or usurpation of jurisdiction, as the condition was imposed after proper consideration by the confirming authority of the relevant facts of the particular case, and in proper exercise of their discretion under the Licensing (Consolidation) Act, 1910, s. 14 (1).

(ii) it was wrong to assume that there could be no licensed premises unless they had the characteristics of an inn.

[**EDITORIAL NOTE.** It was suggested in this case that modern licensed premises have the characteristic of an inn in that the public generally should have access to them for the purpose of being supplied with refreshment, and that such access could not by the terms of the licence be restricted to a particular class of the public. This contention was rejected, and licensed premises were held to be in the same position as a shop, in that the invitation to do business with them may be restricted to a definite class or section of the public and there is nothing to prevent such a restriction being made a condition of the licence.

As to Conditions attached to Licences, see HALSBURY, Hailsham Edn., Vol. 19, pp. 77-79, paras. 197-199; and for Cases, see DIGEST, Vol. 30, pp. 34, 35, Nos. 265-274.]

Cases referred to:

(1) *Thompson* v. *Lacy* (1820), 3 B. & Ald. 283; 29 Digest 2, *3*.

(2) *Six Carpenters' Case* (1610), 8 Co. Rep. 146*a*; 29 Digest 18, *236*.

(3) *A.-G.* v. *Terry* (1874), 9 Ch. App. 423; 44 Digest 121, *971*; 30 L. T. 215.

Application to make absolute a rule *nisi* for a writ of *certiorari*, which was obtained at the instance of Tamplin & Sons' Brewery (Brighton), Ltd., directing the confirming authority for the county of Sussex to show cause why a certain confirmation order or certificate issued on May 18, 1937, should not be quashed. The facts and the arguments are set out in the judgments.

John Flowers, K.C., and *Eric R. Neve* showed cause on behalf of the Sussex Confirming Authority.

Maurice Healy, K.C., and *Geoffrey Lawrence* in support of the rule.

LORD HEWART, L.C.J.: This is a rule *nisi* for a writ of *certiorari*
to be directed to the confirming authority for the county of Sussex to
remove into this court in order that it may be quashed a certain confirmation
order or certificate made by that authority on May 18, 1937, confirming
a certain grant of a provisional justices' licence authorising
A the licensee to hold an excise licence to sell by retail at certain premises
in Crawley any intoxicating liquor which may be sold for consumption
either on or off the premises, upon the ground—and this is the ground
upon which the rule was sought and granted—that a condition cannot
be attached to a justices' licence whereby the licensee is prohibited from
B serving intoxicating liquor to any but members of a limited class, and
that, therefore, the confirming authority, in purporting to confirm the
grant of a licence subject to such a condition, were acting without jurisdiction.
The writ was obtained at the instance of the well-known brewers,
Tamplin & Sons' Brewery (Brighton), Ltd. The licence, which is referred
C to in the grounds of the rule, is before us. On the face of it, it is the
usual licence to sell by retail any intoxicating liquor which may be sold
under a spirit retailer's (or publican's) licence for consumption either
on or off the premises. The owners of the premises in respect of which the
licence is granted are stated to be the Southdown Motor Services, Ltd.
D Then the words are added, "This licence is granted subject to the
conditions indorsed hereon." Among those conditions, which are seven
in number, there is this condition, upon which the discussion has turned:

> There shall be no sale on the premises to any person other than travellers who hold current tickets issued by Southdown Motor Services, Ltd.

E

There are two further conditions which contradict the generality of the
licence. One is that there shall be no sale for consumption off the
premises, and the other is that the consumption of alcoholic refreshment
shall take place in the lounge and/or restaurant only.

F It is said that this condition is essentially bad, because the sale is
restricted to persons who are travellers holding current tickets issued by
Southdown Motor Services, Ltd.

Mr. Maurice Healy's argument seemed to put the matter in two
ways. For a time, at any rate, he appeared to contend that the necessary
G nature of this condition is of such a kind that no such condition could
ever rightly appear upon a licence. His first argument was to the
effect that the licence must be stamped with the character of universality,
and that, if there is a condition having the effect of destroying that
universality and limiting the application of the licence to a particular
H part of the public, the condition must necessarily be bad. The second
part of his argument seemed to be an attempt to say that, although such
a condition, if one looked at it in general, might be good, nevertheless
it was a question of degree, relating to the circumstances of the particular
case, and that, in the circumstances of this case, there was no justification
for the granting of a licence subject to such a condition. I am not

sure that, in taking up that second position, even in the alternative, he was not in effect abandoning the substance of his main argument.

The statutory power which in this connection is given to justices is to be found in the Licensing (Consolidation) Act, 1910, s. 14 (1). That section provides as follows:

> (1) The licensing justices, on the grant of a new justices' on-licence, may attach A
> to the grant of the licence such conditions, both as to the payments to be made and the tenure of the licence and as to any other matters, as they think proper in the interests of the public. . . .

It is, therefore, quite obvious that the legislature contemplated that, apart from the topic of payments to be made, and the topic of the tenure of the
licence, there might be generically different matters by reason of which the B
licensing justices, in the exercise of their reasonable discretion, would think fit to impose conditions in the interests of the public. Those words are manifestly very wide words, and it seems to me exceedingly difficult to maintain that the condition cannot rightly be in the interests
of the public unless it is held to be in the interests of the whole of the C
public. If the condition is in the interests of a considerable part of the public, then it is true to say that it is in the interests of the public, of which that is a part. It would, I think, be fantastic to argue that a condition cannot be in the interests of the public unless it is in the
interests of every part of the public. D

Our attention was directed to a case in which Wills, J., speaking of the interests of the public, contrasted, with reference to the particular subject, the possible interest of Birmingham, Cardiff and Liverpool, and he said, in the course of his judgment, that it was a matter of pro-
found indifference to the inhabitants of certain places whether the corn E
came by one route or by another. Those remarks are, of course, to be read with reference to the matter which was then being considered. It would be quite idle to contend that no condition can be imposed upon licensed premises in Newcastle unless it is in the interests of the public
in Marlow. If it is in the interests of the public concerned, then it is F
in the interests of the public as a whole.

The alleged necessity of universality in the scope of the licence was sought to be reinforced by reference to *Thompson* v. *Lacy* (1). That case was decided in 1820. Again, it is a little important to observe
with what that case was dealing. The question was whether the owner G
of a certain house of public entertainment had a lien upon the goods of his guests. The question was whether he was subject to the liabilities of innkeepers. Bayley, J., said, at p. 286, in the passage which was read to us, that in the *Six Carpenters' Case* (2) in Coke's Reports:

> . . . a tavern is so far considered as an inn, that all persons are said to have a right H
> to enter it. And I take the true definition of an inn to be, a house where the traveller is furnished with everything which he has occasion for whilst upon his way.

Having looked at the facts of the case, Bayley, J., at p. 287, came to the conclusion:

> that in point of law this is an inn, and that the defendant is under the obligations

> to which innkeepers are liable, namely, that he is bound to receive all persons who are capable of paying a reasonable compensation for the accommodation provided, and that he is liable for their goods, if lost or stolen; and, on the other hand, that he has a lien on the goods of his guests for the payment of his bill.

There are the well-marked characteristics of an inn; but, because there A may be licensed premises which are inns, and because there are inns which have those characteristics of universality, it is a *non sequitur* to argue that there can be no licensed premises unless they are inns. I think it is obvious that in the Act of 1910 there is no such limitation, and that there is nothing in this section, and nothing in the law, which B provides that the justices, when they are considering the conditions which they think proper in the interests of the public, must take care to remember that none of those conditions may destroy or diminish the character of any premises for which that character is not even sought. In my opinion, the main argument fails. It throws the net far too wide. C I am not aware of any such limitations upon the good judgment and good sense of licensing justices as are suggested.

Our attention was also directed to another case which, by way of contrast, does, I think, illuminate the matter. That is the case of *A.-G.* v. *Terry* (3). The judgment of SIR GEORGE JESSEL, M.R., at the D time when he made a decree for an injunction, appears in a footnote on p. 425; and, although the facts of that case have little bearing upon the present case, there is one sentence in that judgment which I think is very important. SIR GEORGE JESSEL, M.R., says at p. 428:

> In this case really I have no evidence whatever of benefit to the public.

E

What a contrast is provided by the facts of this case. The chairman of the confirming authority has made a very careful affidavit, in which he sets out the material facts. He summarises in this way the representations to which he and his colleagues listened:

F

> It was represented to us, and not disputed by counsel for the objectors, that (*a*) the police did not oppose the application; (*b*) this was the only stopping-place on the journey, which occupied about 2½ hours; (*c*) the period of waiting was not sufficient to enable the passengers to go to any existing licensed premises; (*d*) at certain seasons of the year considerable congestion occurred at the existing licensed houses on the said road, and that it was not practicable to use any of them as a stopping-place; (*e*) during the year 1936, 122,000 persons came into the said G station [at Crawley] during licensed hours out of a total of 200,000 persons (all being persons travelling on Southdown Motor Buses) [Southdown Motor Buses being the only motor buses which make that kind of journey in that way] using the station both in and out of licensed hours and that some 60 per cent. of the said 122,000 asked to be supplied with intoxicating liquors.

Then there is an argument alleging that licences of limited user to the H general public existed at stations, piers at seaside resorts, the White City, the Stadium, Harringay, and other places where, by reason of the arrangement and method of managing the premises, licensed persons have to pay for admission to the premises before being able to enjoy the facilities of the licence. Having considered those representations, and having listened to the arguments of counsel, in the course of which argument three of the cases cited to us to-day were examined, the chairman adds this concise statement:

> We were of opinion (i) that apart from the passengers travelling on the said Southdown buses there was no need for the licence, but that the use of the said Southdown Crawley Station was sufficient in fact to justify the grant of such a licence, having regard to the number of passengers and the fact that they could not use the existing licensed premises; (ii) that other road users could use the existing A licensed premises; (iii) that without the imposition of conditions such as those indorsed on the said provisional licence abuses might occur; and therefore (iv) that it was in the interests of the public that such conditions should be imposed, and therefore upon such facts we were of opinion that as a matter of law the justices in granting the said provisional licence were entitled to do so subject to the conditions indorsed thereon.

That able lawyer, in stating the conclusions of the justices in that way, B has, I think, really concluded the matter.

This court was urged to grant a writ of *certiorari.* A writ of *certiorari* means that there has been some excess of, or usurpation of, jurisdiction. Where is the usurpation of jurisdiction here? To my mind, it is quite clear that these justices have rightly construed the section of the statute, C and rightly interpreted the spirit, and indeed the duty, which the statute imposes upon them, and that they have applied their minds to the relevant facts of the particular case to see whether a condition of this kind ought in this case to be imposed. Going back to Mr. Maurice Healy's contention or admission that it is a question of degree, I think it is quite D evident that the materials were such, by way of proving the nature and scope of the benefit that was being asked, as to justify the tribunal in holding that this particular condition was in the interests of the public. In my opinion, the argument which supported this rule fails, and the rule ought to be discharged. E

HUMPHREYS, J.: I am of the same opinion, for substantially the same reasons. I add a word or two of my own only because it may be that this matter is one of some slight public importance. We are asked to quash an order confirming a licence granted by justices. If we are F to act in that way, it must be upon some legal ground. We have nothing to do with the discretion which is imposed upon the justices who sit for the purpose of considering applications for licences. That was realised by those who applied for this rule, because the ground upon which the rule was granted, and upon which it has now been argued, is this, that G a condition, whatever that means, cannot in law be attached to a justices' licence—which means any justices' licence—whereby the licensee is prohibited from serving intoxicating liquor to any but members of a limited class. That is the question of law which is raised.

In my opinion, the contention is entirely unfounded. If there is any H justification for such a contention, it must be on the ground that such a condition interferes with the rights of the public. What are the rights of the public in regard to licensed premises? In my view, the rights of the public in regard to licensed premises as such are non-existent. The public have no more right in regard to a licensed house, as such, than they have in regard to any other place, such as a shop open for the sale of goods and it may be said that the public are invited to come in and buy those goods. The misconception which is at the base of that contention, very generally shared at one time, and apparently not yet extinct, is that persons confound the old common law inn with the A modern public-house. No Act of Parliament, and no section of an Act of Parliament, has been cited to us indicating in the remotest degree that any rights are conferred upon the public when a licence to sell intoxicating liquor is granted. The whole law in regard to the supposed right of a member of the public to be served with intoxicating liquor B whenever he may be lawfully served and he chooses to ask for it is based upon the old law, which is still good law, applicable to inns. If an authority were wanted for that proposition, no clearer authority could be found than the case upon which Mr. Healy relied, apparently, as showing that the public have a right in regard to licensed premises. C The case is the one to which LORD HEWART, L.C.J., has already referred, *Thompson* v. *Lacy* (1). The whole argument in that case turned upon the question: Was a person, who in fact kept what was in law an inn, to get out of his liability as an innkeeper by saying: "I call my place a tavern and a coffee-house"? ABBOTT, C.J., makes this observation, D at p. 285:

> The defendant in this case keeps a house, where he furnishes beds and provisions to persons in certain stations of life, who may think fit to apply for them. I do not know that an innkeeper can do more; for he does not absolutely engage to receive every person who comes to his house, but only such as are capable of paying a compensation suitable to the accommodation provided. Now it appears to me, that E the defendant cannot be distinguished from a person who keeps an inn in the country, in the way of travellers.

Then he refers to the argument in the case, which was that, because the defendant chose to call his place a coffee-house and tavern, and did not keep a house at which stage-coaches, in those days, were in the F habit of calling, therefore, it could be said not to be an inn. In that case, there is no trace of any argument from any of the counsel to the effect that, because the house was licensed, there was any right at all in the public. That was the law in 1820, and, so far as I am aware, it has been the law ever since, and is the law to-day. Are the premises in this G case an inn? Obviously not. The place is a refreshment-room. The only law of which I am aware which in fact attaches conditions to refreshment-rooms is, first of all, the common law, and, secondly, the statute to which LORD HEWART, L.C.J., has referred.

I cannot agree with Mr. Maurice Healy's statement that, as a matter H of history, before 1910, conditions attached to full licences were unknown. With great respect to counsel, and differing from him only because he is young, I would say that, before 1910, conditions were commonly attached to licences all over the country, and more particularly in London, where it was the practice to attach such conditions as, for instance, those to which Mr. Flowers has referred, and which are very common in regard to hotels, providing that there shall be no public bar, and so forth. Indeed, the law reports will be found to contain many cases in which it has been held that certain of such conditions were reasonable, and, therefore, *intra vires* the justices, and that certain conditions were unreasonable, and, therefore, *ultra vires* the justices. The law was crystallised, and crystallised only—it was not new law—in 1910, A in the Licensing (Consolidation) Act, 1910, s. 14, which, as LORD HEWART, L.C.J., has observed, gives to the justices, in probably the widest terms which it was possible to employ, a discretion. The justices are thereby authorised to attach such conditions as they think proper in the interests of the public. If it is once conceded that the justices B have power to attach conditions limiting the use of the licence, then it becomes a question of fact in each case whether the particular conditions attached are in the interests of the public—not in the opinion of this court, because this court has no duty cast upon it of forming any opinion. The question is whether it was open to the justices and the confirming C authority to say, as a matter of fact, upon the evidence before them, that the conditions they imposed were in the interests of the public. In my view, there is nothing more to be said about this case. The confirming authority had it in their discretion to do what they did, and, they having exercised their discretion, this court cannot interfere. D

DU PARCQ, J.: I am of the same opinion. As I understand Mr. Healy's argument, it is conceded, and indeed it is plain, that the licensing justices are entitled to impose a condition which may diminish, I will not say the rights, but what may be supposed to be the advantages, which E would be enjoyed by a section of the public if that condition were not imposed. There is only one restriction upon the right of the justices to impose a condition. It must be a condition which they think proper in the interests of the public. It is the function of the justices to decide whether the condition is proper in the interests of the public, and that F is a function which we ought not to usurp even if we would. It is not for us to decide, or even to consider, whether, in all the circumstances, the condition which the justices thought fit to impose was in the interests of the public. Indeed, on the information at our disposal, there is here no ground for saying that it was not. I agree, however, with Mr. Maurice G Healy, that, if the justices were to impose a condition which, in the view of this court, no reasonable person could honestly say was in the interests of the public, it would be a condition which the justices had no right to impose. I think it is plainly impossible to say that that has occurred here. It is fallacious to say that a condition is not in the H public interest, or may not be in the public interest, if it is the case that a great many of those persons who constitute the public are not directly affected by it; and it is equally fallacious to say that a condition cannot be in the public interest if a great many members of the public neither know nor care anything about it. LORD HEWART, L.C.J., has already read the material parts of the affidavit of the chairman. He says, among other things, that:

> the justices were of opinion that, without the imposition of conditions such as those indorsed on the said provisional licence, abuses might occur.

Anybody who knows as much as we do about the facts will understand A the kind of abuses to which the justices were there referring, and it is impossible to say that there were no grounds before them upon which they might fairly come to the conclusion that such abuses were likely. It seems to me, with the greatest respect to the arguments as they have been presented to us, that it is really absurd to say that it is not in the B public interest that such abuses as the justices there indicate should be prevented.

For these reasons, I agree that the rule should be discharged.

Rule discharged with costs.

Solicitors: *Thomas Eggar & Son*, agents for *Nye & Donne*, Brighton C (for the Sussex Confirming Authority); *Boxall & Boxall*, agents for *Edwin Boxall & Kempe*, Brighton (for the applicant).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

R. *v.* SHEFFIELD CONFIRMING AUTHORITY, *Ex parte* TRUSWELL'S BREWERY CO., LTD.

[King's Bench Division (Lord Hewart, L.C.J., Humphreys and du Parcq., JJ.), **October 20, 1937.**]

Licensing—Bias of justices—Publican's licence—Order of removal by confirming authority—Justices also members of city council—Subject previously considered by council under planning scheme—Public statements showing hostile attitude. A

A licensing confirming authority, which included six members of the local council who were also justices, refused to confirm an order for the provisional removal of a publican's licence to proposed premises at another address. The applicant alleged that the refusal was made by B a bench of justices including justices who were disqualified by bias, in that (*a*) they were members of the city council, which had an interest in the refusal of the application, as it had already been considered by the council under the Town Planning Act and refused, although subsequently granted on appeal; (*b*) the city council were interested in another site, which was competitive with the site referred to; (*c*) the C city council had recently been in litigation with the applicant about another licensed house; and (*d*) one of the justices had previously given public utterance to sentiments of hostility to similar applications:—

Held: the allegations were too unsubstantial to support the contention that the justices were unable to bring impartial minds to bear on the case and thus were disqualified by reason of bias.

[**EDITORIAL NOTE.** Local authorities, as the planning authority and also as the D owners and developers of estates, have to consider and decide upon the restriction, or even the exclusion, of licensed premises from certain areas. The question, therefore, inevitably arises as to whether the members of the local authority, if they sit as licensing justices, are unbiassed persons.

As to Bias, see HALSBURY, Hailsham Edn., Vol. 21, pp. 538-542, paras. 955-958; and for Cases, see DIGEST, Vol. 33, pp. 292-297, Nos. 83-115.] E

Application to make absolute two rules *nisi*, one for a writ of *certiorari* directing the Sheffield licensing confirming authority to show cause why a decision of May 4, 1937, should not be quashed, and the other for a writ of *mandamus* to hear and determine according to law an application F by Truswell's Brewery Co., Ltd., for the removal of a licence. The facts and the arguments are set out in the judgments.

R. M. Montgomery, K.C., and *T. Christmas Humphreys* showed cause on behalf of the Sheffield Confirming Authority.

Maurice Healy, K.C., and *E. C. Chappell* in support of the rule. G

Lord Hewart, L.C.J.: This is a rule *nisi* for a writ of *certiorari* to be directed to the confirming authority for the city of Sheffield for the purpose of quashing an order made by that authority on May 4, 1937, whereby the authority refused the application of Mr. Walter Shirley H Davy, on behalf of Truswell's Brewery Co., Ltd., for the confirmation of an order of provisional removal of a certain publican's licence in Sheffield. Various grounds are set out in the rule. It was alleged that the order was made by a bench of justices, including justices who were disqualified by bias in that they were members of the Sheffield City Council

and the council had an interest in the refusal of the application, for the reason that it had already been considered by the city council under the Town Planning Act and refused by them, though it was afterwards granted on appeal by the Minister of Health. Secondly, it was said that there was disqualification by bias, inasmuch as the city council had
A an interest in another site, which was competitive with the site referred to; again, that the city council had lately been in litigation with this brewery about another licensed house; and, finally, that one magistrate in particular had given public utterance to sentiments of hostility to applications of the kind, and that some of the magistrates were acting
B together, and had taken counsel's opinion on the question whether they might sit.

I have carefully listened to the argument on one side and on the other, and to the statements made in these various affidavits, and, if I thought that there was any real ground for suspecting a likelihood of bias upon
C any one of the grounds mentioned in the rule, I should not have the slightest hesitation in proposing that this rule should be made absolute. It is essential that those who occupy the position of a confirming authority should be not only unbiassed, but also so related to the matter in hand as to be free from any reasonable suspicion of bias. That is, I venture
D to think, a most important matter.

When I look at the particular allegations of fact which are made in the present case, I am driven to the opinion that what is before us is altogether too unsubstantial and far-fetched to justify the quashing of this order. I leave out the manifestly immaterial parts of the argument
E and contentions, and look at the two which have emerged into the forefront. It is said to be a matter of primary importance that this application on the part of the brewery for a removal of the publican's licence was an application to move it to a place about which the council had already expressed an opinion at another time, under the head of town planning.
F In my opinion, there is nothing in that point. When the city council was considering the problem of town planning, it was concerned in the question whether what was then desired under the head of "zoning" would be imperilled if licensed premises were included in the site. The zone was intended to be what is called a subsidiary shopping centre, and
G apparently there were those who thought that it was not congenial to a subsidiary shopping centre that a shop in the nature of a beerhouse should be included in it. It was an error, and it was an error which, upon appeal, was corrected. The Minister of Health pointed out that, under the model bye-laws, there was no objection to the inclusion
H of such premises within such a zone, and there that matter ended. I cannot conceive that, because the city council had made that error, had formed that misconception, which misconception had been put right, there would survive in the mind of any of these persons some sort of lingering hostility, or some feeling of revenge, or some zeal about the controversial position which had been sought for and maintained

without success, so that they would not be able to bring impartial minds to bear upon the present application. I think that there is nothing in that point.

The other point, upon which Mr. Maurice Healy, in his careful and excellent argument, has laid stress, is that there was opposition, because the council itself had at long last contemplated the licensing of premises upon a few sites upon the council's estates—something like 5 licences to 21,000 houses. That is, I suppose, one licence for about 20,000 human beings. It was said that, because one of those sites was not very far away from the site to which it was proposed to remove this licence, therefore, so careful would the corporation be of the financial interests of their beneficiaries that they would take care not to have a competitor so near at hand, and would take care to prevent any possibility of risk of not getting their own site licensed, because one so near had already been licensed. Then the argument was put the other way round, that one of those justices had expressed himself with great vehemence against having any licensed premises at all upon corporation land. The argument was : If this gentleman has so hostile a feeling to licensed premises on the corporation's own land, how hostile must his feeling be against having licensed premises within a dozen yards ? Again, I think upon analysis that there is really nothing in those points. I cannot believe that justices would unconscientiously consider this application because they feared some remote and contingent menace to an application not yet made about land which was corporation land. As for the argument that, because a particular justice is opposed to having licensed premises on council land, therefore he must have objection to licensed premises on other land, that seems to me to be a manifest *non sequitur*. I could imagine, for example, that a member of the Bar or a Bencher of an Inn, not of marked or fanatical temperance proclivities, might have an objection to licensed premises within the precincts of the Temple, yet he might contemplate with equanimity a very attractive set of licensed premises at the corner of Fleet Street and Middle Temple Lane. If this gentleman is so concerned about the sacrosanctity of the council land itself, I can imagine that he might think it might be easier to preserve that sacrosanctity if the legitimate needs of thirsty mankind were provided for not too far off on land not corporation land. I really think that these grounds become so thin as to be transparent, and I think, therefore, that this rule ought to be discharged.

Humphreys, J. : I am of the same opinion. I desire to add only a few words upon two of the matters which have been argued. On the affidavit of Mr. Davy, there appears in para. 6 something which at first sight might indicate that a gentleman called Watkins, who was a member of the confirming authority and also a member of the city council, had expressed views which would make it *prima facie* unlikely that he would exercise proper judicial discretion upon an application

for the granting or confirming of the removal of this licence. But we have Mr. Watkins' own affidavit, and I can see no reason why this court should not accept the oath of that gentleman. In my view, Mr. Watkins' affidavit clears away perfectly satisfactorily any suspicion that might otherwise have been in the mind of anybody as to his views and the
A reason for his actions. He is a gentleman who holds the view, as he is perfectly entitled to do, that the Sheffield Corporation ought not themselves to own public-houses, and, therefore, ought not to take any steps which would facilitate the granting of licences upon their housing estates. I do not think that that expression of opinion is in the least inconsistent
B with that which Mr. Watkins claims, namely, the holding of independent views upon licensing questions generally, and the likelihood of his being an independent magistrate, proper to listen to and decide an application for a licence anywhere else except upon one of the council's own sites.

C Secondly, I agree entirely with what LORD HEWART, L.C.J., has said as to the ground which is put in this way in the grounds for the rule, that the "city council were also interested in another site which was competitive with the site concerned." As I suggested in the course of the argument, if that really were the case, I think there would be a good
D deal to be said against the sitting of any member of the city council upon the licensing bench or the confirming authority; but there is no site which, at the present time, can be described as competitive with the particular site in respect of which this application was originally granted, and the confirmation of which was refused. It appears that the
E council, at the request of a majority of the inhabitants of five estates, covering altogether a very large area, selected five sites as sites upon which, and upon which alone, they would allow any licensed premises to be erected, if and when at some future time it was thought desirable that there should be applications made, and if those applications were
F granted. That is all it comes to. No doubt the council took steps, in regard to the rest of its estates, to insert in any documents of title some clause preventing new licensed premises being erected. In regard to these five sites, there is no such preventive restrictive covenant. That is all that that means. We now know that, as the result of the selection of
G those five sites, someone was bold enough to propose that those five sites should be let to brewers in order that they might make applications. That proposal was declined by the council, and since then nothing has been done in regard to any application for licensing facilities on any of those sites, or in regard to letting those sites to anybody for this purpose.
H I think those facts are, as LORD HEWART, L.C.J., has said, too shadowy and unsubstantial to justify this court in saying that the members of this council who acted in that way are to be presumed to have shown anything in the nature of bias in the matter. For those reasons, and for the reasons which LORD HEWART, L.C.J., has mentioned, I agree that the rule should be discharged.

du Parcq, J.: I agree, and have nothing to add.

Rules discharged with costs.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *E. B. Gibson*, Sheffield (for the Sheffield Confirming Authority); *Godden, Holme & Ward*, agents for *Benson, Burdekin & Co.*, Sheffield (for the applicant).

[*Reported by* Michael Marcus, Esq., *Barrister-at-Law.*] A

B. DAVIS, LTD. *v.* TOOTH & CO., LTD.

[Privy Council (Lord Russell of Killowen, Lord Roche, Sir Lyman B Poore Duff), **June 28, 29, July 1, 2, 5, 6, 8, 9, 12, 13, 15, 16, 19, 20, 22, 23, 26, October 21, 1937.**]

Privy Council—New South Wales—Agency—Care and diligence of agent—Sole agency—Extent of undertaking to "push" sales—Duty in premises under agent's control—Supply by agent of defective stoppers. C

The plaintiff company, who had the sole export agency for a certain brand of whisky in Australasia, made a contract with the defendant company, whereby the latter became the sole agent in New South Wales for the sale of that whisky. By a clause in this contract, the defendant company agreed to devote the principal part of their energies, so far as Scotch whisky was concerned, by means of themselves, their D travellers, and others, to pushing the sale of this whisky in bulk throughout New South Wales. They were, however, not precluded from selling proprietary brands of whisky in response to orders therefor, nor from disposing of their stocks of such whiskies. The plaintiff company became dissatisfied with the volume of orders received from the defendant company, and sued them for breach of contract. It was also a term of the contract that the plaintiff company should supply, E *inter alia*, all corks for the bottling of the whisky, but, by a substituted agreement, the defendant company used a form of stopper which had a lead liner, and a quantity of whisky was thereby rendered unfit for sale:—

Held: (i) the defendant company was under an obligation vigorously to promote the sale of the whisky exported by the plaintiff company, and to sell as much of that whisky as they could throughout the whole F period of the contract, such obligation being subject to their rights under the contract to sell their existing stocks of whisky, and to supply proprietary brands in response to orders therefor. The obligation under the contract was not satisfied by inaction and merely not preferring other brands.

(ii) the defendant company had broken their contract, in that they G had not made a steady effort to sell the whisky supplied by the plaintiff company, nor had they done their best to promote its sales in their tied and managed houses. Further, their travellers had solicited orders for other brands.

(iii) it was a breach of the contract to allow the exhibition of advertisements, in tied and managed houses, of competing proprietary brands; though they would be permitted to stock such brands, and to include H them in their lists of brands stocked.

(iv) there was no implied warranty on the part of the defendant company that the stoppers were free from defect, but, from the relationship between the parties, who were both concerned with the reputation and success of this particular whisky, there was an obligation upon the defendant company to use reasonable care in the matter, and this they had not done.

[EDITORIAL NOTE. There is a very common practice of appointing sole agents for special areas, and such appointments generally contain a term under which the agent has to "push" the sale of the subject of the agency. The present case deals with the construction of such a contract as to the care and diligence required of the agent, and in the main this is dealt with in terms that will be of general application. Apart from the provision to encourage the sale, there is the position arising from the existence of "tied" and "managed" houses, which is not dissimilar to the position arising from ownership of multiple shops. The question of the provision of stoppers for the bottles is treated generally, and will be of interest to any agent who supplies any wrapper or container for the article marketed.

As to Care, Skill and Diligence of Agents, see HALSBURY, Hailsham Edn., Vol. 1, pp. 244-246, paras. 416, 417; and for Cases, see DIGEST, Vol. 1, pp. 429-435, Nos. 1214-1266.]

Appeal from an order of the Full Court of the Supreme Court of New South Wales, dated Sept. 30, 1935. At the trial of the action, Halse, J., had ordered the defendant company to pay to the plaintiff company £7,444 damages and costs, and the Full Court (Davidson, Stephen and Maxwell, JJ.) unanimously dismissed an appeal therefrom by the plaintiff, asking for an increase of damages, but allowed by a majority (Stephen, J., dissenting) the cross-appeal of the defendant company, and reduced the damages to the nominal sum of 1*s*. The action was brought to recover damages for the breach of a contract, whereby the defendant company were appointed for a period of 10 years sole selling agents in New South Wales of certain brands of Scotch whisky. The agreement, which was in writing, and dated Feb. 1, 1929, after providing for the price to be charged to the defendant company, and the price at which they were to be sold, arranged for the purchase by the plaintiff company of a large quantity (30,000 gallons) of another proprietary brand, which the defendant company had in stock at that time. The material part of the agreement, for the purposes of this appeal, was in cl. 4, which read as follows:

(*a*) The said B. Davis, Ltd., hereby grants and the said Tooth & Co., Ltd., hereby agrees to take and accept the sole agency for the State of New South Wales for the sale of James Watson & Co., Ltd., Scottish whiskies for a period of 10 years from June 1, 1929, until June 1, 1939, WITH A FURTHER OPTION of 5 years until June 1, 1944.

(*b*) That the said Tooth & Co., Ltd., agrees with the said B. Davis, Ltd., as follows:

(*c*) That they will during the period of the said agency devote the principal part of their energies so far as Scotch whisky is concerned by means of themselves their travellers and others pushing the sale of Watson's No. 10 in bottle and Watson's Special Scotch whisky in bulk throughout New South Wales.

(*d*) That the said Tooth & Co., Ltd., will not accept the agency for nor take any interest in any other brand or brands of Scotch whisky ALWAYS PROVIDED that this shall not preclude the said Tooth & Co., Ltd., from selling and supplying proprietary brands of Scotch Irish or Australian whiskies throughout New South Wales in respect of orders which may be given to them for such proprietary brands or selling the present stock of whiskies held by Tooth & Co., Ltd.

(*e*) That so long as Tooth & Co., Ltd., hold the agency for Watson's No. 10 and Special Scotch whisky they will purchase all their requirements of bulk Scotch whisky from B. Davis, Ltd., at the prices and conditions provided in para. 2 hereof.

(*f*) That the said B. Davis, Ltd., agrees to supply the said Tooth & Co., Ltd., with all such whiskies as above as Tooth & Co., Ltd., require.

(*g*) That the said B. Davis, Ltd., agrees to supply the said Tooth & Co., Ltd., with

James Watson & Co., Ltd.'s, No. 10 Scotch Whisky for bottling purposes and with the said Watson's Special Scottish whisky and cheaper bulk Scottish whiskies for bulk purposes at the prices and upon the conditions provided in para. 2 of this agreement.

(*h*) That the said B. Davis, Ltd., agrees to supply the said Tooth & Co., Ltd., with all capsules labels corks and wrappers free for the bottling of Watson's No. 10 Scottish whisky only.

(*i*) That the said Tooth & Co., Ltd., shall pay for each shipment against shipping documents on demand.

(*j*) That the said Tooth & Co., Ltd., be allowed £2,000 for advertising purposes during the first year of the agency.

Sir Stafford Cripps, K.C., *G. Granville Slack*, and *C. Butterfield* for the appellant company.

Sir William Jowitt, K.C., *W. W. Monahan, K.C.*, *Valentine Holmes*, and *F. Kingsley Griffith* for the respondent company.

LORD ROCHE: The circumstances in which the agreement of Feb. 1, 1929, was made are as follows: The plaintiff company was registered in London on Oct. 22, 1925, to take over the business of spirit merchants which had previously been carried on by one Mr. Boydie Davis in England and Australia, who became, and was at all material times, the managing director of the plaintiff company. The defendant company has a long-established and large business as brewers and merchants of liquors in Sydney and throughout New South Wales, and owns or controls a large number of tied houses (about 1,200), and from time to time itself occupies and manages others of its licensed houses through managers. Prior to 1929, there had been business relations between Mr. Davis and the plaintiff company on the one side and the defendant company on the other, and, under an agreement of Apr. 30, 1924, the defendant company agreed to purchase annually over a period of years specified quantities of a Scotch brand of whisky known as Macleay Duff. By a further agreement of Mar. 27, 1926, another Scotch whisky known as Low Robertson was similarly dealt in between the parties, and in part this whisky was to be substituted for Macleay Duff whisky to be delivered under the agreement of Apr. 30, 1924. Both these agreements provided for the purchase by the defendant company in each year of their currency of certain specified minimum quantities of the whisky in question. These agreed quantities varied for different years, but ranged from 18,000 to 25,000 gallons per annum. The Macleay Duff whisky, at any rate as regards certain deliveries, proved to be of inferior quality, and, at the date of the agreement sued upon (Feb. 1, 1929), there was a quantity of 46,000 gallons, or thereabouts, of this Macleay Duff whisky in the defendant company's hands, and by the arrival of another shipment this was later increased to about 50,000 gallons. The plaintiff company, in these circumstances, in Nov., 1928, made proposals to the defendant company for cancelling the Macleay Duff and Low Robertson contracts, and for making instead a contract in respect of Watson's whiskies. Watson's whiskies had been sold in New South Wales at an earlier date, but had been off the market for several years. A new company, James Watson & Co., Ltd., associated with what is known as the whisky combine—Distillers, Ltd.—had been formed for the purpose of blending and marketing Watson's brands, and at the end of 1928 the plaintiff company, which is also associated with the combine, was in a position to offer to the defendant company terms A for the purchase of Watson's brands with the sole rights of sale in New South Wales. By an option dated Dec. 1, 1928, and an agreement dated May 21, 1929, made pursuant to the option, the plaintiff company became the sole selling agent for the export of Watson's whiskies to certain countries out of the United Kingdom, which included New South Wales. B In these circumstances, Mr. Davis proceeded from England to Sydney, and, in Jan., 1929, negotiated with Mr. Cleary, the defendant company's general manager, a contract to supersede the Macleay Duff and Low Robertson contracts and to regulate the purchase and sale of Watson's whiskies. [His Lordship read the contract.] Subsequently, as a result C of cables and correspondence between the parties, the quantity of 30,000 gallons of Macleay Duff whisky provided for in cl. 4 of the agreement was increased to 50,000 gallons, with certain variations in respect of the prices to be paid. This purchase was in due course carried out, and the bulk of the Macleay Duff whisky was thus taken off the hands of the D defendant company and off the New South Wales market. It will be observed that the contract, which was, it is said, drawn up by the parties unaided by any legal draftsman, contains no provision for the purchase of fixed minimum quantities annually, but, in cl. 4 (*c*), (*d*), contains provisions requiring certain conduct on the part of the defendant E company.

It is with those provisions and with the meaning and consequences of their somewhat inartificial language that one of the main controversies in this protracted case has been concerned. The agreement was to come into operation on June 1, 1929, but deliveries thereunder F really began a few months later. The writ, as has previously been stated, was issued on Mar. 16, 1934. The period between those dates was taken as being, for effectual purposes, and for the purposes of the action, 4½ years ending Mar., 1934. It was common ground that an economic depression of great severity and of world-wide character reached New G South Wales in the latter half of 1929, and it was said that it lifted there at about the end of 1932. The effect of this depression upon the whisky trade in general, and upon the working of this contract in particular, was a matter of debate and controversy at the trial, and will have to be further considered later. But it is to be noted here that, for the H purpose of securing greater revenue, the duty upon whisky was twice increased during the latter half of 1929. Thus, on Aug. 23, 1929, it was raised by 2*s*. per gallon from 35*s*. to 37*s*. per gallon, and again, on Nov. 22, 1929, by 8*s*. per gallon from 37*s*. to 45*s*. per gallon. The natural result of such increases, and of the anticipation of them, was a large amount of forestalling, in the shape of removals of whisky from bond, and an increase in the quantities purchased by both wholesalers and retailers to avoid payment of the increased prices, which, as usual, followed upon the increases of duty. One of the issues between the parties arises from the defendant company's action in connection with brands of whisky other than Watson's—mostly, if not entirely, proprietary brands. The largest individual constituents in the total sales of proprietary brands were Dewar's and White Horse, but McCallum's Perfection whisky also sold well, and this whisky assumes some importance, as McCallum's, like Watson's, were then newcomers to the market. A company called Goldsbrough Mort were agents for McCallum's, and were influential and active, and apparently the same observations apply to a company called Dalgety & Co., who were agents for White Horse whisky. Another matter of some importance must be mentioned. The whisky was all shipped to Sydney in bulk, and, in so far as it was to be sold in bottles, was bottled by the defendant company at that place. By cl. 4 (*h*) of the contract, corks and capsules were to be supplied by the plaintiff company free. But the defendant company was desirous of using a device other than a cork for bottling Watson's No. 10, and, as a result of cables passing between the parties in the latter part of 1929, it was arranged that the defendant company should procure in Australia the form of stopper it desired. There was some discussion on the argument of this appeal, as apparently there was in the courts below, as to the effect of the cables upon the incidence of the expense of this substituted arrangement, but their Lordships have no doubt that the effect was that the expense was to be debited to the plaintiff company, although, in the events that happened, the cost of certain defective stoppers and replacements is said not to have been so debited. The device adopted was a screw stopper, fitted internally at the top of the stopper with a thin piece of cork covered with a liner of metal foil. This liner should have been of pure tin, and, in the contract with the manufacturers who supplied the stoppers, the defendant company so specified. Unfortunately, the contract was broken, and, as it turned out, over 90 per cent. of lead was used in the composition of the foil. In consequence a large quantity of No. 10 whisky (said to be nearly 4,000 cases, each of a dozen bottles and each containing 2 gallons of whisky) was sold and distributed sealed with stoppers so lined. When the spirit came into contact with the liner, as happens when the bottle is lying down, the metal disintegrated, and caused discoloration of the whisky and the deposit of flakes or sediment in the bottle. The defendant company as quickly and effectively as possible called in whisky so damaged, treated it by unbottling and filtering, and issued it again re-bottled with different and proper stoppers. There can be no doubt that this occurrence was a detriment to the sale of No. 10 whisky, but the extent to which it so operated is a matter of controversy, as is the question whether, and on what grounds, the defendant company is legally liable for any damage flowing from the defects in the stoppers.

After considerable purchases and shipments under the contract sued upon made before the end of 1929, there were no further purchases or shipments until Sept., 1932. From Dec., 1930, there was an interchange of cables and letters between the parties, the purport of which was that the plaintiff company urged the defendant company to give
A instructions for shipments, and complained of the small orders given. The tenor of the replies was that stocks were sufficient, and that the depression was preventing business. The defendant company also suggested some alterations in price and other terms in their favour, and some concessions were made by the plaintiff company. In Aug., 1932,
B Mr. Davis came out to Sydney, and presented complaints against the defendant company's manner of performing the contract. Provisional terms of settlement were negotiated and drawn up at this time, but they were not confirmed by the board of the plaintiff company in England. The only relevance of the provisional terms is that one of them proposed
C the substitution of a fixed quantity to be purchased per annum for the obligations in cl. 4 (*c*) of the existing agreement. Such proposed quantity was a mean between estimates of 15,000 and 10,000 gallons, that is to say, 12,500 proof gallons per annum for a certain period of time, and the trial judge, as will be seen, regarded this figure as some guide to him in
D estimating the quantity that could have been absorbed by New South Wales at the material time. It should be mentioned that a writ was issued in England by the plaintiff company in respect of the matters now in question on Feb. 10, 1933, and notice thereof was served in New South Wales in May, 1933. But on the defendant company's application
E this service was set aside by the court here, on the ground that the defendant company had shown that the proposed English forum was not convenient for the trial of the matters in issue. The present action was then brought. It was suggested, upon the argument of this appeal, that certain greater activity said to have been shown by the defendant
F company, viz., in 1933, was due to the stimulus of the writ in the English action, or to the visit of Mr. Davis to Sydney in 1932. There was in fact a renewal of newspaper advertising in the period from Apr., 1933, to Mar., 1934, and the sum of about £1,480 was then spent by the defendant company upon this form of advertising. Newspaper adver-
G tising had been virtually suspended from Mar., 1930, and entirely from July, 1930, until this renewal in 1933. In the earlier campaign of newspaper advertising, which began in Nov., 1929, and ceased altogether in July, 1930, some £2,180 had been spent. This sum included the £2,000 provided by the plaintiff company in accordance with cl. 4 (*j*) of the
H agreement. Other methods of advertising, by window displays, and by means of mirrors, and other articles bearing the name of Watson's, were employed throughout the whole period now in question, and the sums so expended amounted to about £2,150. A special traveller was employed to travel in the interests of Watson's whiskies from Oct., 1929, to Mar., 1930, when his employment for this purpose was discontinued.

A very considerable amount of Watson's whiskies was used in making gifts and in providing entertainment and refreshment for the defendant company's customers and others. Though this procedure was no doubt part of the ordinary policy of the defendant company, intended to forward its business generally in beer and everything else, yet possibly it may also have served to make Watson's whiskies more widely known.

The action was heard by HALSE ROGERS, J., as a commercial cause, and appears to have been tried with exemplary care and patience during the 45 days occupied by the hearing. The first matter argued and disposed of as a preliminary question was the construction of the contract between the parties. The contentions of the parties upon cl. 4 (*c*) of the contract may be stated broadly to be as follows : The plaintiff company's contention was that the defendant company undertook to push the sale of Watson's whiskies, and to devote the principal part of its energies to this end, that is to say, the powers possessed by the defendant company were to be actively exercised to this end. The contention of the defendant company was that, so long as the defendant company did more for Watson's whiskies than it did for all other brands combined, the contract was performed. It was added to this contention that it might be a term proper to be implied in the contract that the defendants would carry on its business in Scotch whisky as before, with such modifications as might be reasonable in the circumstances. On this point, the judge in the main adopted the contention of the plaintiff company. He held that the defendant company undertook to " feature " this whisky, adopting an expression used by counsel for the plaintiff company, that is to say, to make it prominent in its whisky business, and so to push it. He also held that this whisky had to be put in the forefront of the Scotch whisky business. The judge refused to admit evidence of what other agents for other brands did, and limited the inquiry to the opportunities and achievements of the defendant company itself. The parties were also at issue as to the meaning of the phrase in cl. 4 (*d*) of the contract, " nor take any interest in any other brand or brands." It was said for the defendant company that this merely prohibited anything of a nature *ejusdem generis* with an agency, that is to say, an interest of a financial nature. It was said for the plaintiff company that the words were general, and forbade any interest in or concern with other brands, beyond selling them if unsolicited orders for such brands were given to the defendant company. Upon this topic, the judge thought that the words were intended to cover any sort of pushing which might tend to prevent the defendant company from devoting the principal part of its energies to pushing Watson's whisky, and reserved for later consideration all questions as to whether specific acts which might be proved constituted a breach of this term of the contract so interpreted. Other matters of construction were also debated and decided, but in the main these have now ceased to be material. The legal position as to the stoppering of the bottles and the responsibility

for the defective liners was not considered at this stage of the hearing. After this preliminary judgment, the allegations of breaches of agreement were dealt with: a large body of evidence was heard, and a very large number of books and documents was put in, and dealt with in argument. In addition to the issues now in question, other issues, some of them of
A first importance, such as an allegation of improper blending of Watson's whiskies with other whiskies, were dealt with and decided. In the main, the allegation of improper blending failed, and is no longer an issue in the case. On the issues arising out of the obligations imposed by cl. 4 (*c*) of the contract, the judge in a considered judgment dealt with various
B branches of the defendant company's organisation, such as methods of sale, advertisements, travellers, tied houses and managed houses, and other matters, and the gist of his final conclusion was that there had been a failure by the defendant company to make Watson's whiskies, either No. 10 or the Special, a real feature of its business, and that it
C did not put them in the forefront of its business, and that it adopted a policy of *laissez-faire* instead of pushing the whiskies. As regards the stoppering of the bottles, it was contended for the plaintiff company that the defendant company, by undertaking to bottle No. 10 whisky, warranted the materials used for the bottling. The defendant company
D contended that it was at most liable for negligence, and that no negligence was proved. The judge thought it unnecessary for him to decide the legal question, inasmuch as, on the facts, he found that negligence was proved, because no test was made of the liners supplied, and because the damaged whisky was not analysed. Certain conduct alleged to
E constitute breaches of the term as to taking an interest was held not to constitute such breaches. Certain minor breaches of other terms of the contract were held to be established. There was then a further hearing on the question of the amount of the damages, and further oral and documentary evidence was adduced. In the result, the judge held that
F the deficiency of effort below the required standard and the negligence in regard to the liners had resulted in a loss of sales, and, therefore, of purchases. He thought that the estimates of the plaintiff company's witnesses as to the extent of the loss were very extravagant, and that there was great uncertainty as to the true figure, but that his best guide
G was the figure taken by the parties in their abortive negotiations for a compromise. He therefore took as the quantity that could have been sold, and would have been purchased, an average of 12,500 gallons per annum during the 4½ years. He subtracted the amount actually bought, and awarded 5*s*. per gallon, which it is agreed was the correct figure,
H in respect of the difference. He treated the bad stoppering as responsible for the loss during one year, when taken in conjunction with a contemporaneous failure adequately to push Watson's Special, and he treated deficiency of effort in respect of both brands of Watson's whisky as responsible for the loss during the remaining 3½ years. The resulting figure for damages was £7,444 in sterling, or £9,305 in Australian currency.

He gave the plaintiff company the general costs of the action, and, under powers given to him by an earlier consent order, made an order as to the taxation of the costs of issues upon which one or other party had succeeded.

From this judgment, as has already been stated, both parties appealed, and, as has also been stated, the Full Court was unanimous in dismissing the appeal of the plaintiff company for an increase in the damages. With regard to the cross-appeal of the defendant company, Davidson, J., gave a reasoned judgment in favour of allowing this appeal, with costs, save as to certain very minor breaches of contract, in respect of which he held that the damages were nominal only. Maxwell, J., concurred in the order proposed by Davidson, J. Stephen, J., dissented, and was for upholding the judgment for the amount awarded by the trial judge. It should be stated that further documents were put in at the hearing of the appeal, but, though these may have further elucidated the issues, they did not, as it appears to their Lordships, materially alter the position in any respect. The minor breaches may be dismissed from consideration, because it was not contended for the plaintiff company that, if the majority judgment stood, and these were the only breaches, the damages were worth discussion or consideration. On the matter of stoppering, it was held that there was no negligence, and on this issue Stephen, J., agreed with the other members of the Full Court. The difference of judicial view arose upon the main issue, the breach of cl. 4 (*c*) of the contract, which the trial judge had held to be established. Davidson, J., appears to have adopted to the full the construction of the clause contended for by the defendant company, and thought that, if the defendant company conducted its business as it had done before, or conducted it in the manner it thought best in the *bona fide* exercise of its discretion, giving to the plaintiff company more of its energies than it gave to others, then there was no breach of contract. As regards the detailed matters of complaint, other than the minor matters already referred to, Davidson, J., found that neither in respect of its travellers, nor its tied houses, nor its managed houses, nor otherwise had the defendant company been in default. Stephen, J., agreed with the trial judge upon the construction of the contract and in his findings of a breach of contract. He thought that there had been a default in the obligation to push Watson's whiskies during a substantial part of the contract period, and he thought that the figure of 12,500 gallons per annum was too low an estimate of the proper quantity to be bought and sold over the average of the years in question. Accordingly, he thought, in spite of his view upon the stoppering issue, that the award of the trial judge as to damages did not call for any variation.

This appeal was very fully and very ably argued by counsel on both sides, and their Lordships are much indebted to them for the assistance thus afforded, both in the consideration of the very voluminous documentary and oral evidence bearing upon the facts of the case, and in the consideration of the matters of construction which lie at the root of the matter. Their Lordships find it unnecessary, in these circumstances, themselves to discuss at any great length the various topics which have been so fully debated at the bar, and will content themselves with stating as compendiously as may be the conclusions at which they have arrived. A As to the construction of the contract, their Lordships are of opinion that the contention of the plaintiff company is correct upon the main point, that is to say, the extent of the obligation imposed upon the defendant company by cl. 4 of the contract. In their view, the obligation was to push, that is to say, vigorously to promote sales of, Watson's B whiskies, or in other words, to do the best that the defendant company could do to sell as much as could be sold. The only limit to the obligation was quantitative, and not qualitative. Instead of an obligation to use all its energies in pushing the sale of Watson's whiskies, the defendant company was to devote the principal part of its energies to C that end, reserving out of them enough to do that which it was allowed to do under cl. 4 (*d*). The various subclauses of cl. 4 are closely related, and must be read together. So read, in the opinion of their Lordships, it becomes plain that the defendant company was obliged to use its organisation, with its staff, its tied and its managed houses, for the D purpose of actively encouraging, and, so far as possible, effecting, sales of Watson's whiskies in bottle and in bulk. This obligation, however, was not to prevent it from selling existing stocks of whisky, or from selling proprietary brands of whisky in bottles to satisfy orders given for such brands. It followed that purchases of such brands of whisky might be E made by the defendant company to satisfy the demand represented by such orders. All bulk whisky (other than existing stocks) had to be purchased from the plaintiff company. Further, as to the proprietary brands, the defendant company might not accept any agency for, nor take any interest in, any other brand or brands. The words " any F interest " are very wide, and their precise meaning has been much debated. Their Lordships are not disposed to limit their scope; but it is unnecessary and undesirable to attempt to enumerate all the cases they would cover, seeing that, for reasons which will appear later, their Lordships are of opinion that, on the facts of this case, there was no breach G of this particular provision of the contract. The contentions raised before this Board by the defendant company in opposition to the plaintiff company's contentions were: (i) that there was no provision in the contract for the actual exertion of effort, but merely a provision as to that proportion of any efforts in fact exerted which the defendant com- H pany was bound to devote to Watson's whiskies. It was said that the contract was silent as to the totality of the effort to be put out, and that, if the proportions were right, that was enough. It follows from what has already been said that their Lordships cannot accept this contention. It seems, amongst other things, to give entirely insufficient weight to the word " push," a word not of art but of well-known significance. It

would also logically justify complete inaction, so long as other whiskies were not preferred; (ii) as an alternative to this main contention, it was submitted by Mr. Monahan in a forcible argument, as it was submitted in the courts below, that in subcl. (*c*) there was to be implied a term that the defendant company should carry on its business in Scotch whisky as before, with such modifications as might be reasonable in the A
circumstances. Their Lordships are unable to hold that any such implication is consistent with the express terms of the contract, or is necessary or proper in itself. Previous business between the parties had been done on the basis of fixed or minimum quantities to be purchased annually, and when for such an obligation there was substituted cl. 4 (*c*) a new B
situation arose. With fixed or minimum purchases, the defendant company could do what it liked with its purchases. To do what it liked in the new situation might be to ignore the plaintiff company and Watson's whiskies altogether. In this connection, the purchase by the plaintiff company of the Macleay Duff stocks cannot be disregarded. It was C
no doubt in the interest of both parties that those stocks should be off the New South Wales market, but they were taken off the market at the expense of the plaintiff company. A bargain for real and active effort to sell Watson's whiskies was the least that might be expected or implied in return, and that is what, in their Lordships' view, was expressly pro- D
vided. It is, of course, true that the efforts required would have to be conditioned by the potentialities of the defendant company's business, and by the circumstances which might arise to affect it. The obligation was to do what the defendant company itself could reasonably do, in such circumstances. For this reason, their Lordships are not prepared E
to assent to a contention, urged on behalf of the plaintiff company, that the trial judge was wrong in rejecting the evidence of agents for other whiskies. The judge was, in their view, justified in rejecting evidence of that character which was tendered to him.

The next question to be determined is: What, if any, breaches of the F
contract were committed by the defendant company? Their Lordships have followed and considered the elaborate and helpful analysis of the evidence by counsel, and have considered it in all its details, but their conclusion can be stated broadly. It is that the defendant company was fundamentally in breach of its contract in that, during a considerable G
part of the material period, it performed the contract as it contended in the litigation it was entitled to perform it, that is to say, with activity or comparative passivity, as it suited the defendant company for its own business purposes that it should be performed. Their Lordships are much impressed with the variableness of the efforts made by the defendant H
company as between one time and another, and as between some parts of its organisation and other parts. At first there were active efforts to sell Watson's No. 10, and not inconsiderable efforts to sell the Special. But these were not steadily maintained, though there were partial revivals of interest from time to time. It should not be taken that no

efforts to sell the whiskies were made afterwards. The facts contradict any such idea. But such efforts were partial and spasmodic. Some travellers were active in the matter. Others were not. Some managed houses sold large quantities of Watson's whisky, and thus showed that it could be done. In others, there was a conspicuous failure in this A respect, and the failure was, in their Lordships' view, mainly due to the absence of effort to sell. The higher management of the defendant company failed, for reasons which have already been indicated, to appreciate that they were bound, under the contract, to see that all travellers and all licensees were active in the matter. In one important district B of New South Wales, the Newcastle district, it is clear that the district manager, a Mr. Hall, who gave evidence, neither realised that sales of Watson's whiskies were to be pushed nor in fact pushed them. He was plainly mistaken in thinking he had not been told that the whiskies were available and should be sold, but it is equally plain that he forgot or C ignored the matter, and that, at any rate for a considerable period, he was not corrected from the head office, and did not alter his methods of business in this regard.

The question of the tied houses must be specially considered. The effect of the ordinary form of covenant employed to tie licensees to the D defendant company was (*a*) to give the defendant company exclusive advertising rights in the tied licensed houses, including the right to remove any advertisements therein, and (*b*) to oblige the licensee to deal solely with the defendant company for spirits, amongst other liquors. It is certain that in respect of both (*a*) and (*b*) the full legal rights of the E defendant company were not exercised, but it is said that all that could reasonably be done was done, and that licensees ought not to be coerced, and could not successfully be coerced, into buying particular liquors. Their Lordships agree with the last proposition, but they think that considerably more could have been done by the defendant company F without any injudicious or improper oppression. With regard to tied houses, there is not as ample material as exists in the case of managed houses for a comparison of business done in one tied house with that done in another, but some comparison is possible on the oral evidence and on the documents, and it is again noticeable that there is an inequality G and irregularity of results in connection with sales of Watson's whiskies. This irregularity and inequality, in their Lordships' view, making all allowances for differing circumstances, is explicable only by difference in the amount of effort expended in impressing on the licensees the desirability of selling these whiskies. The very limited extent to which H Watson's Special was introduced into managed houses or into tied houses as what is called a house whisky is a fact of significance, and their Lordships are impelled to the conclusion that it was attributable to default on the part of the defendant company. But, in their Lordships' view, an even more important matter is the undoubted fact that advertisements of other brands of Scotch whiskies were allowed, and allowed on

a large and attractive scale, to remain in tied houses, and indeed in managed houses. Licensees could properly be permitted to stock and exhibit such whiskies, and announce through their lists that they had them to sell ; but for the defendant company to allow the continued exhibition of advertisements amounting to propaganda for the merits and claims of other and competing proprietary brands was, of necessity, detrimental A
to the sale of Watson's whiskies, and it was not only within the defendant company's power to prevent such exhibition, but also their duty to do so in the interests of Watson's whiskies. For these reasons, and in these respects, their Lordships find that a breach of the contract to push the sale of those whiskies is established. B

With regard to the allegations that the defendant company broke the term of the contract prohibiting the taking of any interest in any other brands, their Lordships agree with the courts below. The most important allegations were that orders for other brands of proprietary whisky were solicited by the defendant company's travellers. It was also said that, C
when the increases of duty were expected, the defendant company laid in, by way of speculation, stocks of proprietary brands. As to the first matter, for travellers to ask licensees what may be their requirements for various brands is not in any real sense solicitation of or pressing for orders. Advance purchases, made in anticipation of an expected and D
accruing demand, are not in any real sense a speculative purchase. Both courts below have found that there was no solicitation for orders, and that the purchases of stocks were made in the ordinary course of business. So far as matters of law are involved in these conclusions, their Lordships agree with the conclusions of the courts below. In so far as they are E
findings of fact, they are concurrent findings, which their Lordships have no reason to suppose require correction, and with which they will not interfere.

In considering the whole of this question of whether there was a breach of agreement, in the circumstances their Lordships are not disposed to F
overlook or minimise the result and influence of the depression which set in at the end of 1929. On the contrary, they regard it as of great importance, and think that it very much reduced the chances of the success of Watson's whiskies, and that, whatever efforts had been made, sales of this, a newly introduced whisky, would have been much affected. G
But they are satisfied that, with due effort, as required by the contract, substantially more would have been sold than was sold.

The question of the defective stoppering of bottles by reason of the defective liners is also of first importance, because it is plain to their Lordships that this incident also had a substantial and serious effect H
on the campaign for selling Watson's whiskies, all the more as its results coincided in time with the onset of the depression. It is, therefore, of great importance to see whether the defendant company is responsible in law and on the facts for the results of this bad stoppering. As to the law, it was contended for the plaintiff company that the defendant

company impliedly warranted that the bottling would be good and the stoppers free from such a defect as was found in them ; in other words, that there was an absolute obligation upon the defendant company in the matter. Their Lordships cannot accept this contention, but, in their view, there was at least an obligation upon the defendant company to use reasonable care in the matter of the bottling and with regard to the materials employed in the operation. Such an obligation arose out of the relationship of the parties, who were both of them concerned with the reputation and success of these brands of whisky, and out of the fact that the defendant company undertook to procure the stoppers in Australia at the expense of the plaintiff company, and, above all, out of the fact that the defendant company had undertaken to sell as much of the brands as it could, and to bottle negligently would be a method ill-adapted to forward this undertaking. On the facts, the questions in issue are more difficult of solution, but on the whole their Lordships have arrived at a clear opinion that the trial judge was right upon this point, and the Full Court was wrong in its contrary conclusion. The defendant company knew that lead must not be used for the liners. It would be contrary to the Pure Food Act in force in New South Wales and to the regulations made thereunder. The stopper was a new device, so far as its manufacture in New South Wales was concerned. It was, therefore, in their Lordships' opinion, required by common prudence that, with a device new in the above-mentioned sense, with an untried, though generally reputable, supplier, who might have to depend upon unknown subcontractors for his materials such as foil, some test of the result of his work should have been made. Apart from any question of analysis, which, if necessary, could have been made, and ought to have been made, the simple test of filling some bottles and laying them down, or otherwise bringing the whisky into contact with the stoppers and liners, would have put to the proof the efficacy of the stoppers for their purpose, and would have made manifest the defect arising from the use of an improper material. No test whatever was made, and, in their Lordships' opinion, this failure to test was negligence, and constituted a breach of duty and a breach of an implied contract to use reasonable care, for which the defendant company is answerable in damages. As has already been stated, the defective liners did, in their Lordships' opinion, cause a setback to the No. 10 whisky, and brought about a diminution in sales.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be allowed ; that the order of the Full Court should be set aside, save in so far as it dismissed the appeal of the plaintiff company from the judgment of the trial judge ; that the judgment of HALSE ROGERS, J., should be restored both as to damages and costs ; and that the appellants here (the plaintiff company) should have their costs of the defendant company's cross-appeal to the Full Court, which, in the view expressed in this present judgment, should have been dismissed with costs. As regards the costs of the appeal to His Majesty in Council, their Lordships have in mind the fact that the appellants sought by that appeal to obtain a large increase in the amount of damages awarded to them by the trial judge. In this respect, their appeal has failed. Their Lordships are of opinion that, in view of this fact, the order should be that the respondents pay three-quarters of the appellants' costs of this appeal. There should be a set-off of costs, and any costs overpaid **A** by one party to the other should be repaid by that party.

Appeal allowed.

Solicitors: *Seaton, Taylor & Co.* (for the appellant company); *Bell,* **B** *Brodrick & Gray* (for the respondent company).

[*Reported by* T. A. Dillon, Esq., *Barrister-at-Law.*]

KORNATZKI *v.* OPPENHEIMER.

[CHANCERY DIVISION (Farwell, J.), **October 13, 14, 1937.**]

Money—Annuity payable under will and family arrangement—Sum expressed in marks—Assessment of amount to be paid after alteration of German currency—Whether exercise of discretion of court.

Under their father's will, the female plaintiff was given an annuity and certain other rights and the defendant was the residuary legatee. The rights of the parties were subsequently, in 1905, the subject of a compromise approved by the German court, under which, so far as is material to this case, the female plaintiff was to receive an annuity of 8,000 marks. In 1926, the trustees, in pursuance of a decision of the Court of Appeal in England, appropriated £8,489 14*s.* 11*d.* 5 per cent. War Loan in respect of this annuity. The defendant contended that the female plaintiff was entitled to only the produce of this War Loan —which had been converted into 3½ per cent. stock—and the female plaintiff contended that she was entitled at the present time to receive 8,000 reichsmarks :—

HELD : (i) the female plaintiff was not restricted to the actual sum produced by the appropriated investment.

(ii) she was not entitled to 8,000 reichsmarks, but to such a sum as a German court would award having regard to the original liability and to all the circumstances of the case, in this case found to be £500 per annum, payable in reichsmarks at the rate of exchange on the dates of payment.

(iii) the assessment of such a sum was not an exercise of the discretion of the court which could be made by a German court only, but a question of fact, which could be determined by the court in England.

Re Schnapper, Westminster Bank, Ltd. v. *Schnapper* (1) *considered.*

[EDITORIAL NOTE. The present case is upon precisely the same point in law as was *Re Schnapper* (1), but the judgment herein views the matter from a slightly different angle and answers what might be raised as an objection to the procedure adopted. The question is whether the judge in England is exercising a discretion which is really vested in the German court, or whether it is right for him to form his own view of what is right to be done in the matter of fixing the rate of exchange in all the circumstances of the case.

AS TO PAYMENTS EXPRESSED IN FOREIGN CURRENCY, see HALSBURY, Hailsham Edn., Vol. 10, pp. 150, 151, para. 191 ; and FOR CASES, see DIGEST, Vol. 35, pp. 172-176, Nos. 31-63.]

Case referred to :

(1) *Re Schnapper, Westminster Bank, Ltd.* v. *Schnapper*, [1936] 1 All E.R. 322 ; Digest Supp.

ACTION for a declaration as to the sum payable under a deed compromising the rights of parties under a will. The real question at issue was at what rate of exchange the payments should be made. The facts and arguments are fully set out in the judgment.

Raymond Evershed, K.C., and *Wilfrid M. Hunt* for the plaintiffs.

Ronald F. Roxburgh, K.C., and *John Barclay* for the defendant.

FARWELL, J. : The plaintiffs in this case are husband and wife. The husband was an officer in the German Army, and he has now retired. The wife is the daughter of the late Sir Charles Oppenheimer. She has been married now many years to her husband in Germany, and has one son, who is a German subject. She and her husband have at the moment to contribute largely to the maintenance of the son, owing to certain difficulties in Germany with regard to his position. It is not necessary for me to say anything more than that in regard to that matter.

The defendant, Sir Francis Oppenheimer, is the eldest son of the late Sir Charles Oppenheimer, a man of considerable means, who died in 1900 in this country, having become a naturalised British subject during his lifetime. In his will he recited a certain marriage contract which had been entered into by his wife and himself with his daughter, the second plaintiff, on her marriage, and provided in these terms:

> Whereas by the said marriage contract my wife and I agreed that we would cause to be paid to my said daughter until our respective deaths a yearly sum of 7,500 marks since verbally increased to 8,000 marks in half-yearly payments and that in case of the death of my daughter without leaving issue my said wife and I agreed during our respective lives to place at the disposal of the said Rollo [her husband] 2,500 marks to be paid to him by half-yearly instalments during his life and so long as he did not remarry now I direct the trustees or trustee to set apart a further sum of 177,500 marks (making with the said sum of 62,500 marks the sum of 240,000 marks) the said 177,500 marks to be invested in the manner hereinbefore directed for the residue of my trust estate and to apply the income thereof (in lieu of and in substitution for the 8,000 marks agreed by myself and my said wife to be paid to my said daughter by the said last-mentioned contract and in exoneration of myself and my said wife for the same) in accordance with the last-mentioned contract during the life-time of my said daughter Emily and as to the capital—

then the capital of that sum in marks is to go to the children of the daughter.

The effect of that provision was that under the will the lady ceased to be entitled to the provision made under the marriage contract and became entitled in lieu thereof to the payment of the 8,000 marks annually out of the estate of the testator. The residue of the estate, subject to a considerable annuity given to the widow, and certain other charges, was given to the eldest son, the defendant, absolutely, but subject to a proviso with regard to his marriage. The defendant is a married man; he has, I think, no children, but he is married; he married a lady who, during her lifetime, enjoys a considerable income.

Under the law of Germany at that time, the second plaintiff had certain rights, as there was certain real property in Germany which belonged to the testator. That enabled the lady to raise a claim in the German courts that out of the estate of her father she was entitled to more than the provision made for her by the will itself. The matter came to litigation in Germany, but was never finally decided, because, before a final decision, the matter was compromised by the parties in an agreement of Dec. 19, 1905, approved by, and entered into with the sanction of, the German courts, and it is under that agreement that the defendant's obligation, whatever it may be, to make annual payments to the second plaintiff arises. I have been provided with a copy of that compromise, and it is agreed that it is an accurate copy, and I propose now to refer to it.

The effect of the agreement was this, of course, that the lady gave up any claim she had to participate in the property in Germany of her father under German law. She also accepted the provision made by the will in lieu of the provision made under the marriage contract, and the defendant in this action agreed to pay to the plaintiff a sum of 80,000 marks value as at July 1, 1905, and—

> so long as she is alive an annual allowance of 8,000 marks, namely, in half-yearly instalments of 4,000 marks on Jan. 1 and July 1 beginning Jan. 1, 1906. On each annual allowance is to be brought into account in or towards satisfaction the yearly income from the capital of 177,500 marks which according to the will [has been put in trust for the lady and for her children] in so far as this income would have been payable according to the stipulations of the will [to the lady while she is alive.]

The exact meaning of that last sentence does not seem to me, having regard to the whole of the document, to be very easy to ascertain, but I think that at any rate it makes it plain that the sum of 8,000 marks was arrived at from having in mind the amount provided for the lady by the will of her father, and it made it plain, if it needed to be made plain, that the 8,000 marks were to be paid in lieu of the income of the appropriated fund. Then the defendant undertakes to pay the tax so long as Lady Oppenheimer is alive.

Then there is a provision the result of which is that, so long as the sum of 177,500 marks, or its equivalent in investments, is intact, the lady is entitled to receive her annual payment of 8,000 marks; but if, during her lifetime, any part of the capital has been applied under the power of advancement which was contained in the will in favour of her children, or otherwise properly disposed of, then the amount of the annuity is to abate a portion; again making it quite plain that the figure of 8,000 marks was arrived at having regard to the sum which the testator himself had thought right to provide for the benefit of his daughter.

That compromise having been entered into, the proceedings in Germany came to an end, and no difficulty arose with regard to the matter until the outbreak of the War. During the period before the War, the 8,000 marks, which, at the rate of the mark then, was approximately a sum of £392 in English money, was paid; that is to say, the defendant had to find out of his own pocket a sum of £392 a year which, when converted into marks, provided the 8,000 marks to which the lady was entitled; and that sum was duly paid to her, and no difficulty arose. After war had been declared, matters of course took a different aspect, and the lady ceased to be entitled to, or it was impossible for the lady to receive, any part of the money, which was paid to the Public Trustee under the relevant Acts which were passed at the time. In 1926, proceedings were brought in these courts by the trustees for the purpose of having determined whether there ought to be an appropriation to meet this sum of 177,500 marks, or whether, as it was suggested, there was no necessity to make any appropriation until the death of the lady. The matter came before Eve, J., and he determined that the trustees ought to make an appropriation immediately, and at the rate of exchange which was in force one year after the death of the testator, and that decision was affirmed by the Court of Appeal. The result was that it became the duty of the trustees to, and they did in fact, appropriate and invest a sum which produced £8,489 14*s*. 11*d*. 5 per cent. War Loan, of which they became possessed, and of which they now stand possessed, and which they hold upon the trusts of the will in favour of the lady and her children, subject to the provisions of the compromise. That appropriation was not fully effected until the end of 1929, and, in the meantime, and down to that date, payments that were made, first to the Public Trustee, were payments of the full 8,000 marks, treating the pre-War mark as equivalent to the reichsmark. Subsequently, that is to say, as from Jan. 1, 1929, after the appropriation had been fully completed, that practice stopped, and what was paid from that date was the actual interest earned by the War stock. Of course the amount payable has been in recent years substantially reduced, when the rate of interest payable on War stock was reduced to 3½ per cent. It was not until 1929, I think, that the plaintiffs were able to obtain the necessary relief, which entitled them to receive whatever moneys were due to them, either the amount of interest on the stock or the amount payable under the compromise by the defendant.

By a German enactment of 1924, the reichsmark was created, and by that law the old mark, the legal tender before that date, ceased to be legal currency altogether, and the reichsmark was substituted for it. The contract in this case, being made in 1905, was undoubtedly a contract to pay in the mark which then was the legal tender—that is, the old mark. The old mark, by reason of that law, ceased to be of any value whatsoever, and it would seem that there was some question then raised, in the early days after the law of 1924 had come into force, as to what the effect of that new legislation was on a pre-War contract to pay in marks. Some attempt to deal with the matter was made by a German law which came into force in 1925, I think. But that dealt with mortgages and other debts of that sort, and the experts of both sides agree that that law does not affect this sort of case at all.

On Apr. 24, 1935, the solicitors then acting for the defendant write to the lady:

> Having regard to the fact that this investment has been made, and in view of the previous depreciation in the value of the mark and the subsequent depreciation in the value of sterling, it seems clear to us that, under German law, the liability of our client under the compromise agreement is limited to the payment to you of the actual income from the investments now representing the settled legacy. Our client will, therefore, pay to you half-yearly the actual net income received from the investments. The investments consist of £8,489 14*s*. 11*d*. 3½ per cent. War Loan.

That being the attitude taken up by the defendant, naturally the plaintiffs were disturbed, and, taking the view, as they did, that that was not the correct effect of what had happened, they commenced this action, and by their pleadings they asked for a declaration that the defendant was under a liability to pay to the lady an annuity of 8,000 marks during her life by equal half-yearly payments.

In his defence the defendant again asserted his claim that the result of what had happened was that he was no longer under a liability to pay A the 8,000 marks per annum, but that all the lady could get was the actual income from the invested fund. But he also set up that the construction and effect of the agreement depend upon the law of Germany, and that, under that law, having regard to the relevant circumstances, the amount of the said annuity does not exceed, and never has exceeded, B the amount which the said plaintiff has been and is entitled to receive and has been and is actually receiving as the income of the said investment in War Loan. That being the position, the matter now comes before me, but it has been now admitted—in so far as it is not admitted it may be taken to be decided—that there is really no justification for C suggesting, on the true construction of the compromise, according to the law of Germany, and according to the law of this country, whichever law is applied, that the obligation to pay 8,000 marks is not an obligation which remains, and always has remained, although the actual amount which must be paid may be a matter for decision by the courts. D Nothing which has happened in the past has had the effect of releasing the defendant from his liability to pay whatever the sum is that he ought to pay, or put him in a position of being entitled to say to his sister, "You must take what comes from the invested appropriated fund; you shall have that and get no more; and, if it is less than any E sum which might otherwise be payable to you under the compromise, that cannot be helped, and that is the whole of your rights." In my judgment, that is a construction which could not be put on the compromise agreement either in this country or in the courts in Germany. In so far as that claim is set up, in my judgment it is quite wrong. But that F does not get over the real difficulty. That is not a difficulty which is very much more than foreshadowed in the pleadings. The real difficulty is this. Granted an obligation to pay 8,000 marks, that obligation being one entered into before the War, the obligation was to pay 8,000 marks as they were in 1905. On those marks ceasing to be legal tender, G how is the obligation which still exists to be measured? That is the question which I am asked to determine.

There is no doubt whatever that the experts on both sides agree, and the parties are agreed, that this is a matter wholly of German law, and ought to be decided according to the law of Germany. The evidence H which I have had called before me consisted of the evidence of a learned German lawyer on the one side and of an equally learned German lawyer on the other side. Both of them gave their evidence extremely well; they were both of them desirous of being, and were in fact, very helpful to the court. I have had the advantage of hearing those gentlemen, and, having heard their evidence, I can find really very little difference in the opinions which they have expressed. There are certain differences, but in general I think that what the German law is can be stated quite shortly. The effect of the German law is this: that, in the case of a contract to pay money, made before the War, and therefore a contract to pay in the old marks, that contract is not determined by anything which has happened since. The contracting party remains liable to pay, and the other party remains entitled to receive, a sum of money, but what that sum of money is is a matter which must be determined either by agreement between the parties or by a decision of the courts in Germany. The principles which have been applied in the courts in Germany are based upon a passage in Art. 242 of the German Civil Code, which is translated in these words:

> The debtor is bound to effect the performance of his obligation according to the requirements of good faith, ordinary usage being taken into consideration.

As I understand it, what the courts in Germany have done—and there are many cases where this matter has been dealt with by the German courts—is to take the view that, there being an obligation to pay, and an obligation which has not ceased, but it being impossible to effect the payment in the currency which was legal tender at the date of the contract, the equivalent amount, or the amount which ought to be paid, is a matter which must be determined by the courts, having regard to all the circumstances of the case, the considerations which led to the original contract, and, even further back in this case, the provision which the testator himself was contemplating for his daughter and his son, and the alteration in the situations of the respective parties. All those considerations must be taken into account in order to ascertain what is the obligation, or the obligation of the debtor, according to the requirements of good faith, ordinary usage being taken into consideration.

When I heard the evidence of the plaintiffs' witnesses, I was inclined to think that it was a matter which lay wholly in the discretion of the courts in Germany—that is to say, it was purely a matter of discretion, and not a question of fact or of law. Taking that *prima facie* view of the position, I felt grave doubt as to whether I, sitting here in England, could exercise such a discretion at all on behalf of a court in Germany. The exercise of a discretion, even though it be a judicial discretion, necessarily involves some personal contribution from the court to the solution of the problem, and where that personal contribution is one which has to come from a particular tribunal and no other—namely, in this case, the court of Germany—it appears to me it is not a contribution which any other court has any right or jurisdiction to make. I have been referred to a case which came before CLAUSON, J., the case of *Re Schnapper, Westminster Bank, Ltd.* v. *Schnapper* (1). In that case, CLAUSON, J., does seem to have exercised the discretion, if it be a discretion at all. But the point does not seem to have been taken either by the court or by counsel in the case, or considered at all; and, if I were satisfied that this was purely a matter of discretion, notwithstanding that decision, I should feel bound to take the course of finding that it was a matter of discretion for the court, and of taking steps to ascertain from Germany how that discretion would be exercised.

A I have come to the conclusion, however, having heard the evidence on both sides, that, strictly speaking, it is not a matter of discretion at all. No doubt the human element must enter into it, as it must into almost every case which the courts have to determine. On a pure question of law, the human element may have little room to function, B but, in any question such as fixing the amount of damages, and many other questions of that sort—questions of fact—the human element cannot be wholly excluded, and it is a question only of whether one witness or another is to be believed. The human element must have some effect when a judge is seeing and hearing the witnesses. The fact C that the human element enters into the question does not, in my judgment, prevent it being a question of fact, and, if it be a question of fact, then I find no difficulty in this court in determining the fact which would have to be determined in Germany if it were a question for the German courts. In my judgment, on a true view of the evidence that D has been given, I find it as a fact that the result of the German law is that the sum which has to be paid under a contract of this sort is such a sum as a man would feel himself under an obligation to pay, having regard to the original liability, having regard to the circumstances, and assuming the man to be honest and acting in good faith, and taking all E proper circumstances into consideration. That is a question of fact which the court has to determine, and, as I have said, though, in determining it, it is impossible to exclude the human element, it remains a question of fact, and, as a question of fact, I feel no difficulty in dealing with it. The result, then, is that I have to say that I find as a matter F of fact what is the sum which the German courts would decree as properly payable by the defendant to his sister under the terms of this agreement, having regard to all the circumstances of the case. I am clearly entitled, I think, and bound, indeed, to look in the first instance at the origin of this matter, that is, the will of the father. I have to bear in G mind, and, I think, again, this is according to the law of Germany, what is the position of the two parties, or, rather, the second plaintiff and the defendant, *vis-a-vis* the testator. I have to consider the provision which was made for the daughter and the son, and consider what the testator thought was a proper provision to make for his daughter, H having regard to the whole of his estate. I must also consider the relative position of the parties at the present time. I must take into consideration the fact that the lady, on the one hand, has no doubt suffered serious loss, owing to the circumstances in Germany, and her income in Germany is not a very large one. I must also take into account the fact that the amount of the estate to which the defendant is entitled, subject to the possible gift over, is approximately the same as at the date of 1905, and approximately the income is the same. There has been some difference of opinion between the German lawyers as to how far it is relevant to consider that the defendant has married a lady with a considerable private fortune. I myself think that the effect of the evidence is that, although I must not disregard that fact altogether, having regard to the fact that the income of the lady ceases on her death, that is not a factor which ought to weigh very heavily in the balance, one way or the other. But I must take into consideration all these matters, and also, to some extent, the rise in the cost of living, for instance, in Germany, not at the same time forgetting the general lowering of the standard of life which undoubtedly has taken place in Germany since the War.

I have been invited by the plaintiffs to say that the amount paid should be 8,000 marks payable in reichsmarks now at the present time. The result of that would be that the defendant would have to pay in each year in English money, in order to effect the exchange, a sum of £646; whereas in 1905 the payment of 8,000 marks at the then rate of exchange meant that the defendant had to find something just under £400 a year. On the other hand, the position is this, that the defendant has the interest on the War Loan, but that War Loan interest has been substantially decreased, because the 5 per cent. War Loan has become 3½ per cent. War Loan. In other ways, of course—the rate of exchange, and in other ways—the position cannot be treated as being on all fours now with the position that obtained in 1905. I have come to the conclusion that the sum which a German court would award in this case is the sum of £500 per annum, to be paid in reichsmarks in Germany. I think it would be wrong to say that there is to be payment of the full amount at the present marks. When one considers the position of the lady as the testator intended it to be in relation to his estate, and the position of the brother, I think the proportion would be too high if I were to say it was to be £646. On the other hand, I am satisfied that to say £400 would be putting it lower than an honest man, having regard to all the circumstances, ought to feel himself under an obligation to pay. As the defendant's own German lawyer said in the witness-box—and he gave his evidence with the utmost frankness—he thought £400 might be the right figure, but, if the court desired to be generous, something between that and £450 would be the sum which the German courts might well assess. I think it right, and I think the German courts would think it right to be a little more generous than that, and I have come to the conclusion that the right sum, on the facts of the case, the sum which the German courts would award, is what I have stated it to be, namely, £500 per annum, paid in marks at the rate of exchange prevailing when the payments are made.

Declaration that the defendant is bound to pay to the plaintiff an annuity at such rate in reichsmarks as is the equivalent of £500 per annum at the *rate of exchange on the dates of payment by equal half-yearly payments on Jan.* 1 *and July* 1 *in each year. Defendant to pay the costs of the action.*

Solicitors: *Slaughter & May* (for the plaintiffs); *Cruesemann & Rouse* (for the defendant).

A

[*Reported by* J. MACGILLIVRAY ASHER, ESQ., *Barrister-at-Law.*]

D

MELKSHAM URBAN DISTRICT COUNCIL *v.* WILTSHIRE COUNTY COUNCIL.

[King's Bench Division (Lord Hewart, L.C.J., Humphreys and du Parcq, JJ.), **October 21, 22, 1937.**]

A

Town and Country Planning—Land—Development restricted by statute—Compensation for injury to estate or interest—Whether development proposals practicable at date of claim for compensation—Proposals abandoned or amended—Restriction of Ribbon Development Act, 1935 (*c.* 47), *s.* 9 (1) (*a*).

On Sept. 24, 1935, the claimants made proposals for the development of certain land as a housing estate, which proposals were afterwards withdrawn. On Nov. 5, 1935, the claimants submitted other proposals, to which consent was given, and which were unaffected by the restrictions imposed by the Act of 1935, so as to exclude any claim to compensation. The claimants sought to recover compensation, on the basis that the earlier proposals were proposals "at the date of the claim to compensation" which was made on Jan. 6, 1936:— B C

Held: as the earlier proposals for the development of the land were not proposals immediately practicable "at the date of the claim to compensation" within the meaning of sect. 9 (1) of the Act of 1935, the claimants were not entitled to the compensation claimed.

[**EDITORIAL NOTE.** This case has added interest as being the first decision under the recent legislation on the development of property adjoining main roads. In order to secure compensation for injurious affection there must be an immediately practicable proposal for development at the time of the claim. If the proposal that would be affected is abandoned or amended before the date of the claim, it is not then the immediately practicable proposal at that date; and this is so although it is replaced by another proposal in relation to the same land. D E

For the Restriction of Ribbon Development Act, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 28, p. 81; and for sect. 9, see p. 87.]

Special case stated by an official arbitrator under the Acquisition of Land (Assessment of Compensation) Act, 1919, s. 6 (1), asking whether the claimants are entitled in law to recover compensation from the restricting authority. The facts and the arguments are referred to in the judgments. F

A. M. Trustram Eve, K.C., and *H. W. Wightwick* for the claimants. G

R. M. Montgomery, K.C., and *Erskine Simes* for the respondents.

Lord Hewart, L.C.J.: This is an award stated by an official arbitrator in the form of a special case under the Acquisition of Land (Assessment of Compensation) Act, 1919, s. 6 (1). H

The controversy with which the official arbitrator was concerned was a controversy arising out of a claim made by the present appellants upon the restricting authority, as it is called, under the provisions of the Restriction of Ribbon Development Act, 1935. This comparatively new statute, the Restriction of Ribbon Development Act, 1935, has been very carefully and in much detail examined before us by counsel on behalf of each party, but I think that the question with which we are concerned is comparatively clear. After hearing evidence and the argument, and the points of law submitted on the one side and on the other, the official arbitrator submits for the opinion of this court one question, and one question alone, namely, whether the claimants are entitled in law to recover compensation from the restricting authority, in the circumstances of the case. The effect of an examination of the history of the case is, in my opinion, to exhibit the essential importance of the provisions of sect. 9 (1) of the statute. By the provisions of that subsection :

> . . . if any person having any estate or interest in land, which includes any piece of land subject to restrictions in force under sect. 1 or sect. 2 of this Act, proves that his estate or interest is injuriously affected by the restrictions, he shall be entitled to recover from the highway authority compensation for the injury to that estate or interest . . .

In other words, the compensation, if any, to which the claimant in any such case is entitled is compensation for injury to an estate or interest in his land ; and it is an indispensable condition that that land, in which he has an estate or interest, and as to which he seeks to prove that it is injuriously affected by the restrictions, must include some piece of land, at any rate, which is subject to restrictions in force under the provisions of the Act. Having in that way explained the scope of the compensation under the statute, the section goes on to provide amongst other things that :

> . . . no claim for compensation under this section in respect of injurious affection to any estate or interest shall be entertained by an arbitrator (*a*) unless the claimant satisfies the arbitrator (i) that proposals for the development of that land which at the date of the claim to compensation are immediately practicable or would have been so if this Act had not been passed, are prevented or injuriously affected by the restrictions . . .

It is quite clear that the term " injurious affection " in these few lines is used with reference to two different matters. The ultimate endeavour of the claimant must be to show that his estate or interest in land has been injuriously affected by the restrictions ; but, in order to get over what Mr. Trustram Eve has called the first hurdle, he has to show another kind of injurious affection, namely, that proposals for the development of his land which, at the date of the claim to compensation, are immediately practicable, or would have been so but for the Act, are prevented or injuriously affected by the restrictions. The injurious affection which is there spoken of is the injurious affection of the proposals for development. One thing, at any rate, seems to me to be very clear, and that is that among the most important words in this proviso are the words, " which at the date of the claim to compensation are immediately practicable or would have been", but for the Act. The crucial time is the date of the claim to compensation. A little reflection shows not only how important but also how manifestly reasonable, if one may say so of something which has been enacted by the legislature, are those limiting words. How could it be right, for example, that the owner of an estate or interest in land should seek and recover compensation because of injurious affection to proposals for the development of his land which had been relegated to limbo, which had become more or less ancient A history, and in spite of the fact that he had given them up to pursue another course, which, to his own complete satisfaction, and with a view to ultimate profit, he had been able successfully to carry through? The proposals must be contemporaneous proposals; they must be current and effective at the date of the claim to compensation. B

In the present case, while it is interesting to observe that there is no finding by the official arbitrator of injurious affection to any proposal, two proposals are dealt with as a matter of history, and have been closely investigated in the arguments before us. For brevity, I may call them the earlier proposals and the later proposals. Without repeating C unnecessarily the details of the case, one may say that there was a time when this urban district council was minded to use this land for the purpose of a housing estate in a certain way, and for that purpose the council prepared plans and made some kind of application. It is said that, in so doing, the claimants here made proposals for the develop- D ment of their land. Indeed, counsel for the claimants is concerned to rely very strongly upon those earlier proposals. But those proposals were not proposals at the date of the claim to compensation. There had been an afterthought, there had been an actual amendment, and the original proposals, for good reason, had been given up in favour of the E new proposals, which involved—though no question of money arises about it in this case—the acquisition of some further land. New proposals had been clearly formulated, and those proposals undoubtedly were contemporaneous with the claim. The feature which is manifest with regard to those proposals is that it could not seriously be sought to F be contended that there was injurious affection. Therefore, the claimants are really in this position, when they have made their position clear, as indeed their counsel has done, that, in order to give the arbitrator jurisdiction, they seek to look at the later proposals, and, in order to obtain an allegation of damage, they seek to look at the earlier ones; G and so they blow hot and cold. It is not to be ignored that in this case there are very clear provisions of sect. 9 (4) (*a*), not, indeed, with regard to this particular matter, but with regard to the assessment of the amount of value of the estate or interest, that:

> . . . there shall be taken into account any modification of those restrictions by H reason of any consent given by the highway authority and any conditions attached to such consent, or by reason of any undertaking given or proposed to be given by the highway authority and any such consent, conditions, or undertaking, shall be embodied in the award.

When this controversy had reached the point where a claim for compensation was formulated by the claimants, and when the official arbitrator was called upon to acquaint himself with the nature and the grounds of their claim, partly by reason of the consent which had been given and partly by reason of prudent and sensible steps which the claimants had taken, they were in a position to carry out, and to carry out to the full, the then existing proposals for the development of their A land; and it may well be, and perhaps they well knew, that the afterthought at which they had arrived may have produced for them a more profitable undertaking. I cannot see that there is any reason, certainly there is not any finding, that the proposals current at the date of the claim were injuriously affected, to say nothing of their being prevented, B by the restrictions of the statute.

With regard to the earlier proposals on which, even at the eleventh hour, reliance is sought to be placed, I cannot think that the claimants may look at the earlier proposals for the sake of arguing that, if those proposals had been sought to be carried out, there would have resulted in C relation to them some damage from the restrictions contained in this statute. It seems impossible to me that they can use the later proposals to found a claim and the earlier proposals to ascertain their damage. The arbitrator was bound to look, and, for the purpose of sect. 9 (1) (*a*), to look only, at the proposals at the date of the claim to compensation.

D In those circumstances, it is quite clear that, although counsel for the claimants has stated his argument with his usual clearness and completeness, I have no doubt that the answer to the question asked by the arbitrator, the only question asked by the arbitrator, is No. That being so, the effect will be that a further part of his award and determination E will have effect, namely, that, under para. 5 (*b*) of the case, the claimants will pay to the restricting authority their costs of the arbitration.

HUMPHREYS, J.: I agree that the claimants in this case are not entitled to be compensated in the way in which they ask for compensa-F tion under the Act, for this reason: in my opinion, they have failed to bring themselves within the terms of sect. 9 (1) (*a*) of the Act in question. I do not think it matters whether the two plans accompanied by the documents of Sept. 24, 1935, and Nov. 5, 1935, respectively are regarded as two separate proposals, or whether the second is regarded as a modifi-G cation or amendment of the first, so that they may be regarded as one proposal. What has to be considered, I think, is what was the proposal for the development of the land which, at the date of the claim to compensation, was immediately practicable and which has been prevented, if it has been prevented, or injuriously affected by the restrictions.

H I cannot for myself, upon the facts of this case, say that the proposal (I am assuming, for the purpose of my judgment, that it was a proposal, and properly so described) of Sept. 24, 1935, was a proposal at the date of the claim to compensation, which was on Jan. 6, 1936. It seems to me that it is a mere question of fact, and that it is impossible to say that that was a proposal which was before the arbitrator at all. In fact, it had been put forward as a proposal which had been refused, and which had, I think, been abandoned. Whether it is to be treated as abandoned and something else substituted or to be treated as amended, it was no longer the proposal which was before the arbitrator at the time when the claim was made. I think that the proposal, and the only proposal, which could come within the language of that subsection is the proposal of Nov. 5, 1935, to which consent was given, and in regard to which I cannot say that there has been effected by the restriction any prevention or injurious affection which would give rise to any claim to compensation at all.

du Parcq, J.: I am of the same opinion. The first difficulty with which counsel for the claimants had to contend was that put in his way by the words of sect. 9 (1) (*a*) of the Act. The words are that no claim to compensation shall be entertained by an arbitrator:

> . . . unless the claimant satisfies the arbitrator (i) that proposals for the development of that land which at the date of the claim to compensation are immediately practicable or would have been so if this Act had not been passed, are prevented or injuriously affected by the restrictions . . .

I agree that in this case the proposals which the official arbitrator was considering were the proposals contained in the letter of Nov. 5, 1935. In the statement of facts, the official arbitrator says:

> It was agreed that the proposals of the claimants for the development of the land were immediately practicable and that there was a demand for such development.

When one looks at the earlier paragraphs in the statement of facts, there are no proposals referred to at all under that name except the proposals in the letter of Nov. 5; and it is quite clear, to my mind, that, when the official arbitrator stated that agreed finding as to proposals, he meant the proposals of Nov. 5. Moreover, in my opinion it is plain that those were the only proposals then current, or, one may say, then in existence at all. The earlier proposals had been withdrawn; they no longer existed. In the letter of Nov. 5, the surveyor who wrote the letter says this, dealing with the acquisition of the land marked blue on the plan:

> The cost of the acquisition of this property will of course have to be borne by the houses on the estate, and will be reflected on the rents, but the committee appreciate that this revision will make for greater safety so far as the road users are concerned.

So that the fact was that the claimants, remembering, I suppose, that they had duties to the public, saw good sense in the council's criticisms of their earlier suggestions, and withdrew them, not only for the reason that they met with objection, but also for the reason that that objection appeared to them to be well-founded. I think, therefore, with the other members of the court, that the claimants did not satisfy the arbitrator on these findings that the proposals were prevented, because the only proposals in existence were not being prevented at all. But, supposing

one looks at those words in another way, and says: "Well, proposals may include proposals which once existed but are now non-existent," even if one is willing to do that, the answer is that it was not true to say, at the time, that the proposals, including the withdrawn proposals, are prevented—I lay stress, of course, on the word "are"—because it
A was not true at the time to say it, because those proposals were not then being prevented by the restrictions, because nobody was then wishing to carry them into effect. That is, I agree, a complete answer to the case which has been ingeniously put before us by Mr. Trustram Eve.

B The force of his argument was this, and, if I may say so, he put it, as I think, in the best way open to him. He said: the word "proposals" is apt to include the original proposals; those proposals, if only we could have carried them out, were, at the time the matter came before the arbitrator, immediately practicable, or would have been so
C if the Act had not been passed. Those proposals are prevented in the sense that we are prevented, not indeed from building houses, but from making the access which we wish to make to what has been called the green land. For the reasons I have given, I do not think that the words of the section can be strained to include that set of circumstances.

D But, even granting that Mr. Trustram Eve could surmount what he called the first hurdle, he would, in my opinion, be in a hopeless position when one comes to look at sect. 9 (1), because then it would be necessary for his clients to prove to the arbitrator—and, again, the present tense is to be observed—that his estate or interest is injuriously affected by
E the restrictions. Upon these findings of fact, there is not a word to show that, at the time the matter came before the official arbitrator, the estate or interest of the claimants in the green land was injuriously affected by the restrictions. All we know about it is that the claimants were in a position to proceed with building the houses that they wished
F to build. They were, it is true, going to have a means of access to their land which was not the means of access which they had originally desired, but, be it observed, upon their own view, a better one, better in the sense that it was safer for road users, including their own tenants and those who might wish to visit their tenants. We know also that they had
G bought adjacent property, we know not at what price, and for all we know they may have made a very good bargain. We know that they have built another house, again we know not at what cost, and we know that the value of the houses on their estate is so much improved by what has happened that they are proposing, according to the letter of the surveyor,
H to increase the rents. There is nothing whatever to indicate to us that there will be any lack of tenants. On those findings of fact, it seems to me to be impossible to say that there is anything from which anybody could infer that the estate or interest of the claimants was injuriously affected by the restrictions, as the matter came before the official arbitrator.

Mr. Trustram Eve says that we ought to read into the award of the official arbitrator a finding of some such injurious affection, but all that the arbitrator says is that he assesses the compensation at a certain figure if the claimants are entitled to be compensated. I can only assume that the official arbitrator thought it fair to give the claimants an opportuntity of having the point, raised before him by the solicitor then appearing, considered by this court, but he does not lend any countenance to it except by finding facts which, in my view, in no way support it.

I would only add, though with some hesitation, because, indeed, I am not sure Mr. Trustram Eve intended to persist in that part of his argument, that he did at one stage seek to derive some comfort from sect. 9 (4) (*c*), which provides :

> if the piece of land has, since the date on which the restrictions came into force, become, or ceased to be, separate from other land, the amount of compensation shall not be enhanced by reason of its having so become or ceased.

The argument, as I understood it, was that we ought to say that that section means that, if the piece of land has ceased to be separate from other land, the amount of compensation must not be reduced. There are two answers to that. First, that the section does not say so ; it deals only with the enhancement of the amount of compensation ; and, secondly, that nobody is suggesting that the amount of compensation should be reduced here because the piece of land has ceased to be separate from other land. No compensation is recoverable here, because, in the circumstances of this case, the claimants do not bring themselves within the Act. They did not show the arbitrator that proposals were being prevented or injuriously affected by the restrictions, nor did they show the arbitrator, or give him any evidence, so far as appears from the award, that their estate or interest was injuriously affected by the restrictions.

Question asked by arbitrator answered in the negative.

Solicitors : *Lees & Co.*, agents for *A. M. Smith*, Melksham (for the claimants) ; *Sharpe, Pritchard & Co.*, agents for *W. L. Bown*, Clerk to the Wiltshire County Council (for the respondents).

[*Reported by* Michael Marcus, Esq., *Barrister-at-Law.*]

JONES *v.* WELSH INSURANCE CORPORATION, LTD.

[KING'S BENCH DIVISION (Goddard, J.), **October 18, 22, 1937.**]

A *Insurance—Motor insurance—Use of vehicle in connection with business or profession—Profession stated in policy—Insured also carrying on other business—Physical characteristics of goods carried—Road Traffic Act,* 1934 (*c.* 50), *s.* 12 (*d*).

B The plaintiff obtained a judgment against T. in respect of injuries caused by the negligent driving of T.'s motor car. T. having no means, the plaintiff sued T.'s insurers, the defendant corporation, under the provisions of the Road Traffic Act, 1934, s. 10 (1). T.'s insurance policy covered the use of his car "for social, domestic and pleasure purposes," and for use "in connection with his business or profession" as stated in the schedule. T. was a motor mechanic, and was described as such in the schedule, but in his spare time farmed a few sheep. At the time of the accident, which caused the injuries, the car was being used to convey some sheep. The plaintiff relied, *inter alia*, upon the provisions of the Road Traffic Act, 1934, s. 12 (*d*):—

C HELD: (i) T. must be regarded as carrying on a business of sheep-farming, as a sideline. At the time of the accident, his car was therefore being used not in connection with his business of a motor mechanic, but for the carriage of goods in connection with a business other than that stated in the policy and the plaintiff could not recover in this action.

D (ii) this was not a question of the actual nature of the goods carried or their physical characteristics within the Road Traffic Act, 1934, s. 12 (*d*).

[**EDITORIAL NOTE.** This case is purely a question of construction of the policy, and it shows that the court will strictly construe the conditions of user of a car. The Road Traffic Act, 1934, s. 12 (*d*), which bars conditions dealing with the weight and physical characteristics of the goods carried, does not prevent the goods carried being restricted to the insured's business or profession as stated in the policy.

E AS TO AVOIDANCE OF RESTRICTIONS ON SCOPE OF POLICY, see HALSBURY, Hailsham Edn., Vol. 18, pp. 565, 566, para. 915; and FOR CASES, see DIGEST, Supp., Insurance, Nos. 3217 *j*-3217 *m*. FOR THE ROAD TRAFFIC ACT, 1934, ss. 10, 12, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 27, pp. 544, 546.]

F Cases referred to:

(1) *Piddington* v. *Co-operative Insurance Society, Ltd.*, [1934] 2 K.B. 236; Digest Supp.; 103 L.J.K.B. 370; 151 L.T. 399.

(2) *Re Wallis, Ex p. Sully* (1885), 14 Q.B.D. 950; 4 Digest 21, *134*.

(3) *Newland* v. *Bell* (1816), Holt, N.P. 221; 4 Digest 20, *117*.

(4) *Levinger* v. *Licensees and General Insce. Co.* (1936), 54 Ll. L.R. 68.

G (5) *Harris* v. *Amery* (1865), L.R. 1 C.P. 148; 43 Digest 7, *23*; 35 L.J.C.P. 89; 13 L.T. 504.

ACTION brought under the Road Traffic Act, 1934, s. 10 (1), by the injured party, to recover damages awarded in respect of personal injuries from

H the insurance company which had delivered a certificate of insurance to the owner of the car causing the injuries. The facts are fully stated in the judgment.

The material clauses of the policy were as follow:

1. The company will indemnify the insured in the event of accident caused by or through or in connection with any motor car described in the schedule . . . against all sums including claimant's costs and expenses which the insured shall

become legally liable to pay in respect of (i) death of or bodily injury to any person except where such death or injury arises out of and in the course of the employment of such person by the insured. . . .

General Exceptions : The company shall not be liable in respect of any claim arising (i) while any motor vehicle in connection with which insurance is granted under this policy is (*a*) being used otherwise than in accordance with the description of use contained in this policy. . . . .

Description of Use : In respect of vehicles described in the schedule to this policy, use for social domestic and pleasure purposes and use by the insured in person in connection with his business or profession as stated in such schedule but excluding always (*a*) use for hiring commercial travelling racing and/or pacemaking . . . (*c*) use for the carriage of goods or samples in connection with any trade or business.

Schedule : The insured : Robert Alun Thomas. Carrying on or engaged in the business or profession of motor engineer and no other for the purposes of this insurance.

The Road Traffic Act, 1934, s. 12, provides as follows :

> Where a certificate of insurance has been delivered under sect. 36 (5) of the principal Act to the person by whom a policy has been effected, so much of the policy as purports to restrict the insurance of the persons insured thereby by reference to any of the following matters . . . (*d*) the weight or physical characteristics of the goods that the vehicle carries . . . shall, as respects such liabilities as are required to be covered by a policy under sect. 36 (1) (*b*) of the principal Act, be of no effect. . . .

F. J. Tucker, K.C., and *P. B. Morle* for the plaintiff.

N. L. C. Macaskie, K.C., and *Montague Berryman* for the defendants.

Tucker, K.C.: We do not rely on the provision of the policy that the assured is covered while using his car personally in connection with his business or profession, because his business is that of a motor engineer. It is submitted that the car was being used for social and domestic purposes within the meaning of the policy. It is a question of degree. The keeping of a few sheep by the assured, who was fully employed in his profession, does not amount to a trade or business within the exception. Alternatively, we rely on sect. 12 (*d*) of the Act of 1934. [Counsel referred to *Piddington* v. *Co-operative Insurance Society, Ltd.* (1), *Re Wallis, Ex p. Sully* (2), and HALSBURY'S LAWS OF ENGLAND, 1st Edn., Vol. 27, pp. 509-511, paras. 989, 990.]

Macaskie, K.C.: The only purpose for which Thomas kept the sheep was to make a profit. There is no evidence that they were kept for any other reason. The car was not being used for any purpose of a social, domestic or pleasure nature. Therefore the exception applies. Sect. 12 (*d*) does not apply to this accident. It was not caused by the physical characteristics of the goods being carried. The policy does not allow any goods to be carried for the purposes of a trade or business other than that of a motor engineer, and then only if the assured is driving personally. [Counsel referred to *Newland* v. *Bell* (3), *Levinger* v. *Licensees and General Insurance Co.* (4), and *Harris* v. *Amery* (5).]

GODDARD, J. : The plaintiff in this action recovered judgment against one Robert Alun Thomas for £500 and costs taxed at £122 7*s.* 3*d.*, on a claim for personal injuries caused to him by the negligent driving of a motor car owned by the said Thomas and driven by his driver. The defendants are the insurers of Thomas. Before the trial of the action

they repudiated their liability to indemnify him, and he unsuccessfully defended the case as a poor person. Thomas has no means of satisfying the judgment, so this action is brought by the plaintiff against the insurers under the Road Traffic Act, 1934, s. 10 (1), and the question in the case is whether or not the car was being used, at the time of the
A accident, for a purpose permitted by the policy.

Thomas is a motor mechanic employed by the Crossville Motor Omnibus Co. He is a full-time employee, and his wages are £2 14*s*. a week. He owns a small Singer motor car, and it was insured under a policy dated June 13, 1934, renewed from time to time, and in force at the time of
B the accident. The policy provides that the insurers are not to be liable while the car is being used otherwise than in accordance with the description of use contained in the policy. The description of use was "in respect of vehicles described in the schedule, use for social, domestic and pleasure purposes", and, "use in addition by the insured in person in
C connection with his business or profession as stated in the schedule," which in this case was that of a motor mechanic, and excluding in any case the use for the carriage of goods or samples in connection with any trade or business. So the point I have to determine is whether the use at the time of the accident was social or domestic, or for carrying goods
D in connection with any trade or business.

Thomas, as I have said, was a full-time employee of a motor omnibus company. At the time in question, he lived with his father in a remote and mountainous part of Caernarvonshire. His father was a quarryman, and occupied a small acreage of land, where he kept a few cows and
E sheep. In Apr., 1935, Thomas bought 5 sheep. He was then some 24 years of age, and he says he bought them for a hobby. He said that most of the young men in the neighbourhood who worked in the quarries kept a few sheep. One, whom he called as a witness, and who also described sheep as his hobby, kept 25. Thomas hired the grazing on
F 2 acres for £8 a year, so that he could pasture his sheep there till the weather was good enough to turn them out on the mountain. Four of the sheep lambed in the spring of 1936, so that at the time of the accident his flock, if so it may be called, consisted of 5 ewes and 4 lambs. On Mar. 28, he asked his brother to take his car and bring 2 sheep and
G 2 lambs to their father's house. He was going to make some arrangement with his father to pasture them on his land, and intended fetching the rest of the animals later on. While on this journey, with the sheep in the car, an accident happened. Now, though Thomas says he kept sheep as a hobby, and in one sense that is no doubt true, it is equally
H clear that he kept them with the intention of selling the lambs, and possibly the sheep also, to butchers or farmers when opportunity offered. He hoped to make some profit by so doing. I am asked to hold that he was keeping the sheep for pleasure only, for something to occupy his spare time, and because amusement was hard to come by in so remote a district. People no doubt do breed sheep as a hobby; pedigree

animals are often bred for the interest that they give to the owner, and in the hope of winning prizes at shows. But sheep-breeding is hardly a pastime in the proper sense of the word, and, though I have no doubt that Thomas felt as much interest in his little flock as a breeder would in a pedigree flock, I cannot avoid the conclusion that the real object in view was the making of a little extra money to supplement his wages as a mechanic. A mechanic earning £2 14*s*. a week cannot afford the luxury of stock-breeding solely for pleasure and enjoyment; nor does Thomas pretend that he was breeding lambs for the purpose of killing them for food for himself and his family. The truth is that he was a sheep-farmer, though on a very small scale, and I think that I am bound to hold that he was carrying on that business as a sideline, so to speak, but none the less it was a business.

The car at the time of the accident was accordingly being used, not by the insured in person in connection with his business of a motor mechanic, but for the carriage of goods in connection with the business of sheep-farming.

Mr. Tucker did argue that the restriction in the policy would not affect the plaintiff, by reason of the provisions of the Road Traffic Act, 1934, s. 12 (*d*). He submitted that the restriction related to the physical characteristics of the goods, and so was of no effect against the plaintiff. The question here is not as to the actual nature of the goods carried, or their physical characteristics, but whether the use of the car was for domestic or business purposes, or whether the goods carried, whatever their nature, were in connection with business.

The result is that the action fails, and must be dismissed, though I come to this conclusion with as much regret as a judge may properly feel when he gives effect to what he decides are the legal rights of the parties. For this adds another to the growing list of cases which show that, in spite of the statutory provisions for compulsory insurance, persons injured by motor cars through no fault of their own may be left with no prospect of obtaining compensation, a position to which the late Swift, J., not long since called attention in vigorous and pointed language. The public believe, and with reason, that the Road Traffic Acts insure that, if they have the misfortune to be killed or injured by a driver's negligence, there will at least be compensation for themselves or their dependants, knowing nothing of the pitfalls which still abound in policies, in spite of sect. 12 of the Act of 1934. No one can fairly expect insurers to pay on a risk additional to that for which they have received a premium. On the other hand, no one supposes that Thomas realised that, by asking his brother to bring a sheep up to the house in the car, he was putting himself in a position of an uninsured person, a conclusion at which I have arrived after reserving judgment, and after having the advantage of a keen argument by two eminent King's Counsel; nor do I mind admitting that in some respects I found the case presented difficulties. No legislation can guard against the criminal who wilfully drives an uninsured car, but it is just as well that it should be realised that, though there may be a policy in force, and an unauthorised person is driving the car which causes injury, there is no certainty that liability will attach to the insurers.

There will be judgment for the defendants, with costs.

A *Judgment for the defendants with costs.*

Solicitors: *Jaques & Co.*, agents for *Nee & Stanley Jones*, Caernarvon (for the plaintiff); *Berrymans* (for the defendants).

[*Reported by* C. ST. J. W. NICHOLSON, ESQ., *Barrister-at-Law.*

Re AN ARBITRATION BETWEEN BRITISH METAL CORPORATION, LTD., AND LUDLOW BROS. (1913), LTD.

[Chancery Division (Clauson, J.), **October 22, 1937.**]

Arbitration—Appointment of arbitrator—Notice to parties—Appointment of third arbitrator—Umpire—Whether notice necessary—Custom—Arbitration Act, 1934 (*c.* 14), *s.* 4 (1).

A contract for the sale of goods was entered into "subject to the customary terms and conditions and subject to the rules and regulations of the London Metal Exchange, in so far as these rules and regulations do not conflict with the provisions of this contract." A dispute having arisen, the matter was referred to two arbitrators, who formed the view that it was necessary to appoint a third. The appointment of the third arbitrator was made without any communication to the parties, who became aware of it only upon receiving the award. The rules of the London Metal Exchange provide that arbitrators may, after giving notice of their appointment, proceed in the absence of either or both parties. The award was sought to be set aside, because no notice of the appointment of the third arbitrator was given to the parties, and it was argued against this contention that the third arbitrator was, by virtue of the Arbitration Act, 1934, s. 4 (1), an umpire, and there was a custom for arbitrators to appoint an umpire without any notice to the parties to the arbitration :—

Held : the practice of appointing an umpire or of his acting in the arbitration without notice to the parties could not bind the parties in the present case, as it was wholly inconsistent with the rules of the London Metal Exchange.

[**EDITORIAL NOTE.** In the arbitration here in question, after an original appointment of two arbitrators, a third was appointed. By the Arbitration Act, 1934, s. 4 (1), such third arbitrator is now an umpire. There is a power under the Arbitration Act, 1889, s. 6, for arbitrators, unless the contract provides otherwise, to appoint an umpire, and it has been the custom to appoint such an umpire, and for such umpire to act in the arbitration, without reference to the parties. It is here held that, where a third arbitrator is appointed—although he is now an umpire—the parties must receive notice of appointment and his intention to act in the arbitration where the contract or rules provide generally for such notice in respect of arbitrators.

For the Law on the Point, see HALSBURY, Hailsham Edn., Vol. 1, pp. 644-649, paras. 1093-1099 ; and for Cases, see DIGEST, Vol. 2, pp. 401-406, Nos. 587-619.]

Cases referred to :

(1) *Matson* v. *Trower* (1824), Ry. & M. 17 ; 2 Digest 455, *1025*.

(2) *Re Brook, Delcomyn & Badart* (1864), 16 C.B.N.S. 403 ; 2 Digest 446, *949* ; 33 L.J.C.P. 246.

(3) *Bourgeois* v. *Weddell & Co.*, [1924] 1 K.B. 539 ; Digest Supp. ; 93 L.J.K.B. 232 ; 130 L.T. 635.

(4) *French Government* v. *Tsurushima Maru* (*Owners*) (1921), 37 T.L.R. 961 ; Digest Supp.

(5) *Russian Oil Products, Ltd.* v. *Caucasian Oil Co., Ltd.* (1928), 31 Ll. L.Rep. 109.

Motion by Ludlow Bros. (1913), Ltd., asking that an award dated Aug. 30, 1937, signed by three arbitrators and purporting to be made in an arbitration before two of them, be set aside on the following grounds : (*a*) that the arbitrators misconducted themselves or were

guilty of mistaken conduct in the proceedings which resulted in the making of the award purporting to have been made by the three arbitrators, in that one of them was not duly appointed, nor did he act, nor did the applicants receive any notice of his intention to act, as an arbitrator in the arbitration, nor did they receive any notice of any
A hearing, nor was there in fact any hearing at which the applicants had any opportunity of appearing before or being heard by one of the three arbitrators; (*b*) that the rules for arbitration of the London Metal Exchange were not followed, in that the applicants never received, before the hearing or at all, a statement in writing of the respondents' case,
B with copies of the documents referred to therein, as required by the rules of the London Metal Exchange; (*c*) that the proceedings resulting in the award were unfair, and not in accordance with the rules of the London Metal Exchange.

R. A. Willes for the applicants: The umpire must hear the evidence
C of the parties and of the witnesses, notwithstanding that the same evidence has already been adduced before the arbitrators. He cannot act upon the notes of the arbitrators unless there are special provisions in the submission permitting him to do so. The umpire can make his award on the notes of the arbitrators if no objection is taken. Until
D they received the award, the applicants never knew that the umpire in this case was adjudicating upon the matter. In the present case, the contract leaves no room for implication, particularly an implication opposed to the usual practice.

J. Platts Mills for the respondents: The rules are drawn up in accord-
E ance with an established practice, and, unless there be some provision excluding that practice, the practice applies. There has been a full hearing before the arbitrators. Nothing has been done in the arbitration which is a departure from the rules. As, by the Arbitration Act, 1934, the third arbitrator was an umpire, it was permissible for the arbitrators
F to present the case to him. It is, of course, open to the court to remit the award, if the court thinks that course advisable. The third arbitrator was an umpire by express statutory provision, and it is a well-recognised custom for the arbitrators to present the case to the umpire *in camera*. The custom goes back many years, and there was a case
G in 1864 which showed that it existed then. It has been recognised over a long period. [Counsel referred to *Matson* v. *Trower* (1), *Re Brook, Delcomyn & Badart* (2), *Bourgeois* v. *Weddell & Co.* (3), *French Government* v. *Tsurushima Maru* (*Owners*) (4), and *Russian Oil Products, Ltd.* v. *Caucasian Oil Co., Ltd.* (5).]

H *Willes* in reply: The cases in which the umpire heard the arbitrators and not the parties were cases in which the parties had consented. No case has been cited where a party has been held to be bound by an award made by a person of whom the party had never heard. All that the evidence shows is that the London Metal Exchange does not carry out its rules. By custom, it ignores them. But no amount of custom can violate that which they hold out to the world as that which persons who contract with them assume will be applied to their disputes. They are entitled to assume that disputes will be decided by the rules, and no custom can contradict the express contract.

Clauson, J.: This is a motion to set aside an award made in an arbitration, and the jurisdiction to set aside the award arises under the Arbitration Act, 1889, s. 11 (2), which provides: A

> Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the court may set the award aside.

I want to make it perfectly clear that there is no imputation of improper B conduct on the part of any arbitrator or umpire concerned. The only question is whether the proceedings have been conducted in such a way as not to accord with the way prescribed in the contract under which the dispute arises. The contract, which was an ordinary contract for the delivery of goods, was made on a form which contained these words: C

> We have this day sold to you on customary terms and conditions and subject to the rules and regulations of the London Metal Exchange, in so far as these rules and regulations do not conflict with the provisions of this contract . . . any dispute arising out of this contract must be settled in accordance with the rules and regulations of the London Metal Exchange.

I may say at once that the commencing words "on customary terms and D conditions" cannot qualify the express provisions of the printed rules. I understand it to be argued that, if there be a custom of the London Metal Exchange as to disputes, it would apply to the settlement of disputes, even though inconsistent with the rules. It may be that it would apply to something which is not provided for by the rules, but E I cannot read this contract as importing any custom altering any printed provision of the rules which form the contract between the parties, which is expressed to be subject to the rules of the London Metal Exchange.

Each party to the contract appointed an arbitrator. The two arbi- F trators met, and there was a hearing. Before the hearing, the cases of the two sides were exchanged. The hearing took place on July 28, 1937. Afterwards, without any communication to the parties, the two arbitrators formed the view that it was necessary that they should appoint a third arbitrator. They did appoint a third arbitrator without com- G municating the fact to Messrs. Ludlow Bros., and the three arbitrators seem to have met, and they signed the award. They embodied their conclusions in the award and they signed it, and it is the award signed by the three arbitrators which, in the present proceedings by Messrs. Ludlow, it is sought to set aside. H

The question is whether the award came into existence in accordance with the rules and regulations of the London Metal Exchange. The rules provide in the usual way for the appointment of two arbitrators, and they undoubtedly give the two arbitrators power to appoint a third arbitrator. It would appear, on the construction of the rules, that, if there are three arbitrators, the award of two will be binding. I need not trouble about that, because the three arbitrators concurred in the award. No complaint can be made up to the point at which the arbitration was heard before the two arbitrators. The point is whether it is in accordance with the rules that the tribunal consisting of three arbitrators can A make an award without giving notice of the intention of that tribunal to take the matter of the arbitration in hand, and without giving the parties an opportunity of discussing the matter before them. The matter is slightly complicated by the fact that there is a provision in the Arbitration Act, 1934, s. 4 (1). It reads thus:

B

> 4. (1) Where an arbitration agreement provides that the reference shall be to three arbitrators, one to be appointed by each party and the third to be appointed by the two appointed by the parties, the agreement shall have effect as if it provided for the appointment of an umpire, and not for the appointment of a third arbitrator, by the two arbitrators appointed by the parties.

C The procedure up to the point at which the two arbitrators conducted the hearing is laid down clearly in the rules, and no question arises upon it. The rules provide for the arbitration. Each party shall be entitled to produce certain evidence before the arbitrators, and, as I read the rule, this applies to a case whether there are two arbitrators or three. The rules provide:

D

> Neither party shall, without leave of the arbitrators, be entitled to be heard by counsel or by a solicitor.

That obviously applies to a case where there are three arbitrators. It has been suggested that that applies only where there are two arbitrators, E but that is entirely without foundation. The rules further provide:

> The arbitrators may adjourn the hearing from time to time, giving notice to the parties, and may, after giving notice of any appointment, proceed in the absence of either party, or of both parties, if they shall think fit.

The arbitrators can also engage legal assistance. That rule seems to me F quite plainly to have the result that it is the duty of the arbitrators not to proceed with the arbitration without giving notice to the parties of their intention so to proceed. There was no notice to the parties before the arbitration went to the tribunal of the three arbitrators—who, by the new Act, are an umpire and two arbitrators—to decide the G matter in dispute. It seems to me to be reasonably clear that the proceedings were misconducted, in that no notice was given to the parties, and no opportunity was given to them, to appear before the tribunal. The answer is that it has been the common practice to proceed in this way, that is, for the two arbitrators to appoint a third arbitrator, to have H the matter dealt with without any communication to the parties. It seems to me that this practice is wholly inconsistent with the rules. Accordingly, that practice can have no weight, and cannot in any way give validity to the award, or affect the contract which has been made between the parties. In the course of the discussion, various matters were dealt with which might give rise to the question as

to whether, if that practice were embodied in the rules in a clear form, the practice would bind the parties here. I propose to say nothing as to that, beyond saying that it is clear that it cannot be the law that a decision of a tribunal can be binding on a party who, at the time of the giving of the decision, was entirely ignorant of the existence of the tribunal. I say nothing about that. I decide it upon A
the ground that the matter seems to have been conducted in a manner inconsistent with the rules, and I propose to order that the award shall be set aside, and to order that those who have appeared before me to support the award shall pay the costs of the motion.

Solicitors: *Peacock & Goddard*, agents for *Shakespeare & Vernon*, B
Birmingham (for the applicants); *Linklaters & Paines* (for the respondents).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

COMMERCIAL UNION ASSURANCE COMPANY, LIMITED *v.* INLAND REVENUE COMMISSIONERS.

[KING'S BENCH DIVISION (Lawrence, J.), **October 19, 1937.**]

Revenue—Stamp duty—Policy securing half-yearly payments for 11 *years upon payment of a lump sum—Sale of annuity or security for annuity—Stamp Act,* 1891 (*c.* 39), *s.* 87 (2), *Sched.*

An insurance company, in consideration of a payment of £1,000, issued a policy securing to the insured the payment of half-yearly sums of £52 5*s.* over a period of 11 years:—

HELD: the policy was to be stamped as a security for the payment of an annuity by way of repayment under the Stamp Act, 1891, s. 87 (2), and attracted stamp duty at the rate of 2*s.* 6*d.* per £100 on the sum of £1,000.

[EDITORIAL NOTE. The material question in the present case was whether the effecting of a policy of the kind here in question was in substance a sale and purchase of an annuity, so as to attract *ad volorem* conveyance duty. This contention having been negatived, the difference in duty between a charge under the item of bond, covenant or instrument in the Schedule, or under the Stamp Act, 1891, s. 87 (2), was very slight. Under the Schedule, it would appear that the duty is calculated on the total amount of the payments over the 11 years; but, under sect. 87 (2), it is to be calculated upon the £1,000 paid to the insurance company.

AS TO STAMP DUTY ON ANNUITIES, see HALSBURY, 1st Edn., Vol. 24, Revenue, p. 724, para. 1559; and FOR CASES, see DIGEST, Vol. 39, pp. 275-277, Nos. 604-619.]

Cases referred to:

(1) *Secretary of State in Council of India* v. *Scoble,* [1903] A.C. 299; 28 Digest 65, *337*, 72 L.J.K.B. 617; 89 L.T. 1; 4 Tax Cas. 618.

(2) *Perrin* v. *Dickson,* [1930] 1 K.B. 107; Digest Supp.; 98 L.J.K.B. 683; 142 L.T. 29; 14 Tax Cas. 608.

(3) *Inland Revenue Comrs.* v. *Ramsay* (1935), 154 L.T. 141; Digest Supp.; 20 Tax Cas. 79.

(4) *Hennell* v. *Inland Revenue Comrs.*, [1933] 1 K.B. 415; Digest Supp.; 102 L.J.K.B. 69; 148 L.T. 150.

CASE stated by the Commissioners of Inland Revenue pursuant to the Stamp Act, 1891, s. 13, for the opinion of the High Court. The Commercial Union Assurance Co., Ltd., issued a policy to one, E. P., dated Aug. 28, 1936, whereby, in consideration of a payment of £1,000, that company undertook to pay to E. P. a sum of £52 5*s.* half-yearly during a term of 11 years. The half-yearly payments were calculated to return to E. P. over the period of 11 years the sum of £1,000, together with interest thereon at 2½ per cent. It was contended by the company that the policy was chargeable with bond duty at the rate of 2*s.* 6*d.* per £100 on the total sum secured, or on the sum of £1,000, or at the same rate as being a security for an annuity under the Stamp Act, 1891, s. 87 (2). The commissioners were of opinion that the policy was a purchase of an annuity for £1,000, and was chargeable with conveyance duty on £1,000.

Stamp Act, 1891, s. 87 (2), provides as follows :

> A security for the payment of any rentcharge, annuity, or periodical payments, by way of repayment, or in satisfaction or discharge of any loan, advance, or payment intended to be so repaid, satisfied, or discharged, is to be charged with the same duty as a similar security for the payment of the sum of money so lent, advanced, or paid.

A

Terence Donovan for the appellant company.

The Attorney-General (*Sir Donald B. Somervell, K.C.*) and *J. H. Stamp* for the Commissioners of Inland Revenue.

Lawrence, J. : The question that I have to decide in this case is B
as to the appropriate stamp duty to be paid upon a policy issued by the Commercial Union Assurance Company for securing payment of a sum of money by periodical instalments. The policy was issued upon a proposal which describes the proposal in these terms, as a proposal to secure the payment of a sum of money by periodical instalments, and C
states the total amount to be paid by instalments as £1,149 10*s*., and that the instalments are to be paid half-yearly, and that the proposer is to pay £1,000. That is the substance of the proposal. The policy itself states that the £1,000 had been paid by the proposer on Aug. 7, and witnesses that the amount mentioned in the schedule, namely, the D
£1,000, having been paid, the company would, subject to the provisoes and the special conditions, make to the payee the payments mentioned on the dates specified without any deduction whatsoever except income tax in respect of such part of the payment as represents interest, and the schedule provides that £52 5*s*. should be paid half-yearly during the E
term of 11 years. The commissioners have decided that this policy is a bond, covenant or instrument which falls within the exception to subsect. (1) of that definition in the Stamp Act, and therefore attracts the duty provided for by sect. 60 as upon the sale of an annuity, and the main question that I have to decide is whether this policy was security F
for an annuity, the original creation of which was by way of sale, and, if it was not, whether it is a security for the payment of any annuity by way of repayment. It has been argued on behalf of the appellants that the policy does not secure an annuity—that, on the authority of cases which have been decided upon the Income Tax Acts as to the meaning G
of the word "annuity," this was not an annuity, but was the repayment of the capital sum which was paid by the policyholder, and it is argued that that is clear upon the terms of the proposal and the policy itself, which never mentions the word "annuity," but speaks of the policy as securing the payment of a sum of money by periodical instalments, and, H
although it does not actually specify the amount or the rate of interest, it refers in the body of the policy to interest on the payments and speaks throughout—or at any rate speaks throughout the proposal—of payment by instalments of a sum of £1,149 10*s*. in consideration of the payment of £1,000.

In my opinion, the authorities upon the Income Tax Acts have no bearing upon the meaning of the word "annuity" in the definition of bond, covenant or instrument in the Stamp Act. The authorities to which reference was made, namely, *Secretary of State in Council of India* v. *Scoble* (1), *Perrin* v. *Dickson* (2), and *Inland Revenue Commissioners* v. *Ramsay* (3), all refer to the question whether, what were alleged to be annuities, were taxable under the Income Tax Acts or attracted surtax. In my opinion, those cases have no bearing, because it has been laid down, and it is clear, that the Income Tax Acts only tax income, and therefore in taxing annuities they only tax annuities which are of an income nature, and not of a capital nature. That consideration has no application, in my opinion, to the Stamp Act, and particularly having regard to the fact that the definition with which I have to deal contrasts annuity with sum or sums of money at stated periods, and it has been held upon that definition in *Hennell* v. *Inland Revenue Commissioners* (4) that "annuity" in that definition means a payment which has reference to some yearly period or period which is a fraction of a year, and the other words, for "a sum or sums of money at stated periods," have reference to periods which have no reference to a year or fraction of a year; and therefore it seems to me, in the absence of any governing considerations such as are applicable to the Income Tax Acts, there is no ground for limiting the word "annuity" to annuities of an income nature.

I am, therefore, of the opinion that this policy which does refer to payments of a half-yearly nature is a security for an annuity within the meaning of the definition. Then Mr. Donovan has argued that, even if that is so, it is not a security for an annuity the original creation of which was by way of sale, and he says that, by virtue of the Stamp Act, 1891, s. 87 (2), the policy was a security for the payment of an annuity by way of repayment, and, if it falls within sect. 87 (2), it is agreed that it attracts a lower rate of tax than the rate of tax which it would attract if it fell within the exception of subsect. (1) of the definition of bond, covenant or instrument. As, in accordance with the principle which is stated by LORD HANWORTH, M.R., in *Hennell* v. *Inland Revenue Commissioners* (4), at p. 421, that—

> where there is a charging section or charging Act the meaning of which is in doubt, it ought to be construed in favour of the subject,

I am of opinion that this case ought to be decided in favour of the appellants, on the view that this policy was a security for the payment of an annuity by way of repayment. As ROMER, L.J., said in *Inland Revenue Commissioners* v. *Ramsay* (3), which I have already cited, regard must be had to the actual words used in dealing with these highly technical matters, and all the words of the proposal point to a repayment of a sum of money by periodical instalments; the amount to be paid by the proposer is mentioned, and the total amount to be paid by instalments is mentioned, and the capital sum and interest are referred to, though not specified in the policy itself.

In those circumstances, it seems to me that the actual terms of the proposal and the policy are more aptly described by sect. 87 (2) than they are by the exception to subsect. (1) of the definition of bond, covenant or instrument. I do not think it is necessary for me to indicate any A view as to whether, if the income tax cases were applicable, this would be an annuity within the meaning of those Acts as construed by the authorities which have been cited, because I hold that those cases have no application to the construction of the word "annuity" in this context. I am, therefore, of opinion that the document should be stamped in B accordance with the provisions of sect. 87 (2) of the Stamp Act and the relevant part of the schedule, and I allow the appeal with costs.

Order: *the correct stamp duty chargeable upon the instrument was 25s.*

Solicitors: *Coward, Chance & Co.* (for the appellants); *Solicitor of Inland Revenue* (for the respondents). C

[*Reported by* W. J. Alderman, Esq., *Barrister-at-Law.*]

R. *v.* MORDEY, THE BOARD OF CONTROL AND EAST HAM CORPORATION, *Ex parte* WINTERFLOOD.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Humphreys and du Parcq, JJ.), **July 29, October 27, 1937.**]

A *Lunacy—Defective—Detention—Order—Continuance Order—Whether imperative that it should be made on date of expiry of previous order—Mental Deficiency Act,* 1913 (*c.* 28), *s.* 11.

On June 11, 1929, an order was made under the Mental Deficiency Act, 1913, that the applicant, being then a defective, should be detained in an institution. That order would expire on June 25, 1930, but it B was continued by a continuance order made on June 23, 1930. A further continuance order, which in this case would have continued the detention for a further 5 years, was made on June 29, 1931, and another on July 6, 1936. It was contended that the last two orders were invalid as being made after the actual date of expiry of the previous order, which was the quarter day :—

C HELD : the Mental Deficiency Act, 1913, s. 11, does not require that the continuance orders shall be made on the exact date of the expiry of the previous order : but it is sufficient if they are made within a reasonable time before or after that date.

[EDITORIAL NOTE. The Mental Deficiency Act, 1913, s. 11, provides for the making of detention orders. An order remains in force in the first place for one D year, but, if continued at the expiration of the year, the order then remains in force for a further 5 years. The question in the present case is whether the order continuing a detention order must necessarily be made at or before the expiration of the previous order, or whether it can be made within a reasonable time thereafter. It is decided that, having regard to the great number of such orders and the care required to decide upon their continuance, the legislature can only have meant E that the officials concerned should have a reasonable time in which to make the order.

AS TO DETENTION ORDERS, see HALSBURY, Hailsham Edn., Vol. 21, pp. 472-474, para. 847 ; and FOR CASES, see DIGEST, Vol. 33, pp. 272, 273, Nos. 1897-1903.]

APPLICATION to make absolute a rule *nisi* for a writ of *habeas corpus* F The occasion for the rule and the facts are fully set out in the judgment

The Attorney-General (*Sir Donald Somervell, K.C.*) and *Valentine Holmes* for the Board of Control.

G *H. G. Robertson* for the East Ham Corporation.

W. A. L. Raeburn for the applicant.

LORD HEWART, L.C.J. : This is an order *nisi* for a writ of *habeas corpus*, to be directed to the Board of Control and to the corporation of H East Ham, directing them to have the body of one Horace Edward Winterflood brought immediately before this court. The writ of *habeas corpus* is, as LORD WATSON said in a well-known case in 1892, intended to facilitate the release of persons actually detained in unlawful custody ; and the question is whether, upon the materials which are before the court, the true conclusion is that the person referred to is actually detained in unlawful custody, and, if so, by either or both of the respondents to this rule.

The history of this patient has been clearly explained to the court. It is a long history, beginning in 1929. It is common ground that, on June 11, 1929, under the provisions of the Mental Deficiency Act, 1913, an order was made by a court that the applicant for this rule, then being a defective, should be sent to an institution of the kind referred to in that Act. He was accordingly, and under that order, sent to a farm at Hildenborough, and from that time onwards his history has been traced. In 1930 he was released on licence to live with his parents, as he did for a time. On June 23, a little before quarter-day, a continuation or continuance order was made, and in 1931 a continuance order was made on June 29. In 1936, in or about the month of April, trouble arose at Dagenham, where he was then living, and in consequence of what then happened Winterflood was taken to Forest Gate, and thence to the farm at Hildenborough again, where he remained until June 23, 1936, on which day he was sent on licence to certain persons at Southall. When July 6 came, another continuation or continuance order was made, and, in Sept., 1936, there followed some controversy about money matters, as the result of which he was afterwards taken to Forest Gate again, until, on Sept. 25, 1936, a fresh home was found for him with Mr. and Mrs. Mordey, the persons referred to in these proceedings. The detention, therefore, with which we are here concerned is a detention purporting to be under the provisions of the Mental Deficiency Act, 1913, and the question for us is whether it appears that, under a purported order made under that statute, this applicant for the remedy of *habeas corpus* is in fact being unlawfully detained.

Our attention has been directed minutely to the relevant provisions of this statute, and the contention really is reducible to this proposition, that some of the orders which go to explain the detention of this applicant were not made in due time, as provided by the statute, and, therefore, were of no force, and that, therefore, the detention of the applicant cannot be justified.

It is quite clear, when one looks at the scheme of this part of this Act, that the intention of the legislature was and is that there shall be no gaps. There must be no *lacunæ*. There must be continuity, and, if there be not continuity, there is, automatically, release. The provision is that, when the order is originally made, it operates for a certain time. It is subject to periodical renewals, according to circumstances. Sect. 11 (1) provides that an order made under the Act shall expire at the end of one year from its date, unless continued as provided. Then follows the provision that, in the case of an institution of the kind with which we have to do here :

> the Board may by order direct that orders that persons be sent thereto shall,

> unless continued as hereinafter provided, expire on the Quarter-day next after the day on which the orders would have expired under [that provisoin.]

It is common ground that that direction by order was duly made. Then comes subsect. (2):

> An order shall remain in force for a year after the date when under the preceding provisions of this section it would have expired, and thereafter for successive periods of 5 years [if certain conditions are fulfilled].

One of the conditions is as follows:

> If at that date [referring to the order for the year] and at the end of each period of 5 years the Board, after considering [special reports, etc.] consider that the continuance of the order is required in his interests and make an order for the purpose.

Then there follows another proviso. It is quite clear that that concise subsection is dealing very shortly with different circumstances, and it is dealing with them in a compendious phrase. An order shall remain in force after the date when it would have expired—that is, a year—and thereafter for successive periods of 5 years, if, at that date, and at the end of each period of 1 and 5 years respectively, the Board does certain things at that date and at the end of each period respectively.

It is obvious here that we are dealing, not with an order for a year, but with an order for a period of 5 years, indeed, with successive periods of 5 years, and the contention is that some of the later orders, as appears from the dates of the sealing of those orders with the seal of the Board, were not made precisely upon the date which corresponds with the original date. No doubt, as Mr. Raeburn has said, nothing is more important than the liberty of the subject, and, where one is dealing with an Act of Parliament providing for the detention of a human being, it is necessary to be strict. But it is not necessary to be unreasonable, and one has to consider what is the reasonable interpretation of these words.

Speaking for myself, I cannot fail to observe that, in dealing in this omnibus fashion with varying circumstances, the words which the statute employs seem to be perhaps deliberately vague. The question is: When is the continuation order properly to be made? If in the case of an order for a year, it is at the end of the year; if in the case of a period of 5 years, which is this case, it is at the end of that period, if the Board, after considering certain things, considers that the continuance of the order is required in the interests of the patient. Then, without the repetition of the words limited as to date and without the employment of any such word as "thereupon," "immediately," or "forthwith," there follow the words, "and make an order for the purpose." Of course, if there were any indication whatever that there had been any lack of *bona fides*, or if there were any indication whatever that the further detention was not required in the interests of the patient, one would scrutinise these words very astutely to see if the requirements of the section, on their strictest interpretation, had been fulfilled. There is no suggestion here of lack of good faith. There is not a tittle of evidence that the detention which is complained of is other than detention required in the interests of the patient. All that is said is that, owing to pressure of work, although all the requisite steps were taken in due time, and although the relevant conclusion had been arrived at in due time, and on proper grounds, nevertheless the seal of the Board was not actually applied in due time, the interval was an interval of a day or two, something quite inconsiderable.

In that state of the facts, I should myself have been prepared to hold that, when the maxim *de minimis non curat lex* is applied, the conditions of this section had been fulfilled. But I think it may be put in an alternative way, and that, when one looks at the scope of this subsection as a whole, and observes the pointed omission of any express provision for the date of the order referred to in the closing words of subsect. (2), I should be prepared to hold that it is enough if the order is made within a reasonable time, always provided that the consideration of the reports, and the conclusion formed upon them, had been made at the time stated. In the interests of the patient, it seems to me it is no less important that those matters should be dealt with as late as possible than it is that they should be dealt with as early as may be.

We know, from the documents in this case, that those who have the grave responsibility of attending to the administration of this Act have to deal with not hundreds, but thousands of cases, yet it would not be right, for the sake of kindliness, to undertake the investigation of a particular case a considerable time before the crucial date was going to arrive, for the reason that, in the interval which might then elapse, there might be such a change in the condition of the patient as to render the conclusion arrived at not so much nugatory as unfair. It is vital, therefore, that the consideration should be at the appropriate time, and, where we are dealing with a five-year period, it should be at the end of the period. When that condition is fulfilled, it seems to me that the requirement of this statute is satisfied if it is a reasonable time, and after that time the order is made. Whether the section be construed in the one way or in the other, I see no materials here upon which we could reasonably found a conclusion that the detention of this unfortunate patient, a detention solely dictated by his own interests, is in any sense unlawful. I think, therefore, that this rule ought to be discharged.

HUMPHREYS, J.: This is a case which involves a question of the liberty of the subject, and, that being so, as LORD HEWART, L.C.J., has observed, it becomes at once one of importance, because the courts have always been assiduous to preserve, as far as may be, the liberty of the subject.

Mr. Raeburn asks this court to say that the unfortunate person, the subject of the application, is now unlawfully detained, and it appears that he is detained at the moment in a place provided under the Mental Deficiency Acts, 1913 and 1927, by virtue of an order made on July 6, 1936. That order runs as follows :

> The Board of Control having considered the requisite reports and certificate with regard to the above-named patient and the means of care and supervision which would be available if he was discharged, and being satisfied that the continuance of the above order is required in his interest, hereby orders the same to be continued for 5 years from June 24, 1936. The common seal of the Board of Control was hereunto affixed July 6, 1936.

Mr. Raeburn says that that order, which was a continuance of an order originally made on June 11, 1929, as appears on the face of it, is a bad order. As I understand, he says so for two reasons. He says, first of all, that that order was itself not made in accordance with the terms of the section which permits the making of such a continuance order, that is, the Mental Deficiency Act, 1913, s. 11. The second reason is that the order can be good, he says, only if it is a continuance of a valid order, and in truth it is a continuance of an order made on June 29, 1931, which itself was invalid. Perhaps the strongest way in which Mr. Raeburn's case could be put is by the production (and he has referred us to it) of the order which was sealed on June 29, 1931, and upon the face of which it appears that the original order was dated June 11, 1929, and that the date at which the order, which was the effective order detaining this person, would expire, if not continued, is June 24, 1931. The only other date which appears is June 29, 1931, which purports to continue something which Mr. Raeburn says, on the face of it, has expired 5 days before. I find that a very attractive argument on the face of it. If it be essential that one order which expires on some particular day should be renewed before that day has arrived, I should find it difficult to agree with an argument that it does not matter. Mr. Raeburn enforced his argument by a reference to sect. 11, and it is when one looks at sect. 11 that I think the weakness of his position is exposed. He says : looking at sect. 11, there are these direct words, these imperative words, that an order shall remain in force for one year ; and, assuming—I am not now quoting the Act, I am merely paraphrasing it—that, by virtue of a certain provision, that order can remain, and does remain, in force till the quarter-day following the expiry, then that order cannot possibly be effective after that quarter-day. Then he says, by subsect. (2) it is provided that an order shall remain in force for a year after the date when it would, under the general provisions of this section, have expired, and thereafter for successive periods of 5 years, if, at that date—that means, if at some time within the 24 hours indicated by some particular date, which, in this case, was June 24, 1931—certain things are done; and he says they must be done on that day. He was disposed to say at one time that none of them must be done before that date, but I do not think that, on consideration, he seriously pressed that upon the court, because it would seem that, if that were so, an impossible task would be A placed upon persons who, however eminent, are only human, and it would require that there should be hundreds of persons sitting simultaneously (inasmuch as we are told that a great many of these orders are made to expire on quarter-days) considering reports which they are required to consider, and certificates which they are required to consider, doing B it all, and making up their minds, and actually sealing the documents, all on one particular day. But I think that Mr. Raeburn eventually agreed that what was a more reasonable way of looking at the section was, that way which he asked us eventually to say was correct, which was that, assuming the Board might be permitted to consider the reports C and certificates and take the matter into their general consideration before the important day indicated by the words "that date," yet the order in question, the order of continuance, must be made upon that date.

For my own part, I am quite content to assume, and I think D I can go so far as to say I would hold, that, in such a document as this, the date when the order is made must be taken to be the date when it is sealed. Any other rule would lead to great inconvenience. It would enable persons to bring evidence as to when a particular document was in fact sealed or made, although in fact it bore a seal which purported E to be affixed on a particular date. Therefore, I assume that this document, this order of continuance, came into existence on June 29, 1931, the date when it purports to have been sealed. I confess that the more I look at sect. 11 (2) the more I am impressed by, if I may use the word Lord Hewart, L.C.J., used, the vagueness of it. The impression upon F my mind is that, so far from Parliament having been imperative as to the importance of the particular day, Parliament has merely indicated that, where an order is made, it shall last for a year, or, in certain circumstances, a year or the remaining days up to the next quarter-day, that then the person shall not be detained further without a continuance order, and G that that continuance order shall not be made without the most careful examination of every relevant fact which might lead the Board to think that that person might be restored to liberty. There are directions that the Board shall consider various matters, and those various matters are referred to in subsect. (4), being special reports of different descriptions. H Then, when the Board has done that, it is to consider—and I have no doubt whatever that the court ought to assume that in this case they considered carefully and fairly—whether, having regard to all those circumstances it was necessary, in the interests of the patient as well as in those of the public, that a continuance order should be made. It is quite immaterial, so far as the interests of the patient are concerned, whether they actually register that decision on that day or a few days later, so long as, it seems to me, they did it without undue delay, or without unreasonable delay, and that they did it *bona fide*, which is not in dispute in this case. I am fortified in that conclusion by the words of the subsection, which, after using the words " after the date " merely to indicate the first year, uses that curiously vague phrase " at the end of each period of 1 and 5 years respectively ", words which I think Parliament would never have used if it had been intended to make an imperative order that something should be done upon a particular day, and not afterwards.

For those general reasons, agreeing as I do, entirely with every word which has fallen from Lord Hewart, L.C.J., in his judgment, I think that this rule must be discharged.

du Parcq, J.: I agree. The words which we have to consider, so far as this case is concerned, read in their context, are the words, " at the end of each period of 1 and 5 years." I say that because Mr. Raeburn said that he did not press the point which he made about the only order to which the words " at that date " can have any application. When one looks at the whole of this section, it is plain that the Board have to come to a conclusion upon the question whether the continuance of the order is required in the interests of the patient, that is to say, the continuance of the order beyond the date at which it would expire, unless they make an order to the contrary. They cannot possibly come to a conclusion upon that point without considering information which relates to that particular date, that is to say, the end of the period when he would be entitled to be released but for some order by them. They have not to consider the question whether he has been properly detained so far, or restrained so far, but whether it is proper or not to continue to restrain him. They must, therefore, take into consideration reports which bring their information up to that period, and they cannot consider those reports and come to a conclusion, and make an order within the terms of this section, unless some reasonable time is allowed to them in which to consider and make their order. It appears to me, therefore, that we should be compelling the Board to do something which is impossible, or to do their work very badly, if we were to say that they must in all cases come to their conclusion and make their order on the very day as to which they have to make up their minds whether it is proper then to say that the patient ought still for the future to be restrained.

I think, therefore, that the interpretation which Lord Hewart, L.C.J., and Humphreys, J., have put upon this section is the only interpretation which ought to commend itself to this court, and I agree that the rule should be discharged.

Rule discharged. No order as to costs.

Solicitors: *The Solicitor, Ministry of Health* (to show cause against the rule); *E. W. Joslin*, Town Clerk, East Ham (to show cause against the rule); *E. A. R. Llewellyn* (in support of the rule). A

[*Reported by* Michael Marcus, Esq., *Barrister-at-Law.*]

Re DRAKE'S SETTLEMENT TRUSTS, WILSON *v.* DRAKE.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Romer and MacKinnon, L.JJ.), **October 20, 21, 1937.**]

Estate and other Death Duties—Succession duty—Predecessor—Settlement by party with defeasible estate and party with contingent interest subject thereto—Joint predecessors—Necessity for both parties to join in settlement to create interest of successor—Succession Duty Act, 1853 (*c.* 51), *s.* 2.

By the combined effect of a settlement and a will, E. T. T. D. in 1915 became entitled to certain real property absolutely, should he survive the Great War, and, if he failed so to survive, such property went to G. P. T. D. absolutely, subject only to an annuity of £1,200 to the widow of E. T. T. D. In 1917, E. T. T. D., being in want of money, agreed with G. P. T. D. that certain of these hereditaments should be settled, subject to certain prior charges, upon E. T. T. D. for life, after his death to secure an annuity of £1,200 to the surviving wife of E. T. T. D., subject thereto to secure portions for the younger children of E. T. T. D., subject thereto for the first and other sons of E. T. T. D. successively in tail male with remainder to G. P. T. D. for life and then to his sons successively in tail male. In consideration of the settlement, G. P. T. D. was to release his contingent interest in other hereditaments subject to the will. A settlement in pursuance of the agreement of 1917 was executed in 1921, the grantors being both E. T. T. D. and G. P. T. D., and upon the death of E. T. T. D. in 1933, without sons, the property passed to T. T. D., the eldest son of G. P. T. D., under the last limitation, subject to the annuity for the widow and portions for the daughter of E. T. T. D. The question then arose whether, for the purposes of the payment of succession duty, E. T. T. D. was the sole predecessor of the beneficiaries or whether E. T. T. D. and G. P. T. D. were joint predecessors :—

HELD : for the purposes of this case the settlement of 1921 must be treated as coming into operation in 1917. As T. T. D. then became entitled to a vested estate in tail male in remainder, and as that interest could be created only by E. T. T. D. and G. P. T. D. acting together, E. T. T. D. and G. P. T. D. were joint predecessors.

Decision of BENNETT, J., [1937] 1 All E.R. 286, *reversed.*

[**EDITORIAL NOTE.** BENNETT, J., thought this was a case of a sole predecessor, basing his judgment upon the fact that, as the contingent interest of one party failed before the settlement took effect, the interests of the beneficiaries arose wholly out of the estate of the other party. The Court of Appeal have, however, decided that it was a case of joint predecessors on the ground that, at the time the settlement was made, it could only have been made by joining both parties in the transaction.

AS TO PREDECESSOR, see HALSBURY, Hailsham Edn., Vol. 13, pp. 352-354, paras. 386-389 ; and FOR CASES, see DIGEST, Vol. 21, pp. 91-95, Nos. 667-699.]

Cases referred to :

(1) *Lord Advocate* v. *Macalister*, [1924] A. C. 586 ; 21 Digest 107, *796* ; 93 L.J.P.C. 220 ; 131 L.T. 545.

(2) *A.-G.* v. *Belilios*, [1928] 1 K.B. 798 ; Digest Supp. ; 97 L.J.K.B. 139 ; 138 L.T. 294.

(3) *Braybrooke* (*Lord*) v. *A.-G.* (1861), 9 H.L.Cas. 150 ; 21 Digest 94, *694* ; 31 L.J. Ex. 177 ; 4 L.T. 218.

(4) *A.-G.* v. *Floyer* (1862), 9 H.L. Cas. 477 ; 21 Digest 86, *622* ; 31 L.J. Ex. 404 ; 7 L.T. 47.

(5) *Wolverton* v. *A.-G.*, [1898] A.C. 535 ; 21 Digest 90, *660* ; 67 L.J.Q.B. 829 79 L.T. 58.

APPEAL by the defendant Thomas Tyrwhitt Drake from the decision of BENNETT, J., given on Dec. 21, 1936, and reported in [1937] 1 All E.R. 286. The facts and arguments fully appear from the judgment of SIR WILFRID GREENE, M.R., herein and in that report.

J. Bradley Dyne for the plaintiffs.

A. M. Latter, K.C., and *T. K. Wigan* for Captain Thomas Tyrwhitt A Drake.

W. P. Spens, K.C., and *J. V. Nesbitt* for Mrs. Venice Tyrwhitt Drake and her children.

J. H. Stamp for the Attorney-General.

B

SIR WILFRID GREENE, M.R.: This is an appeal from a decision of BENNETT, J., given on an originating summons which raises an interesting question of succession duty. Certain estates, which I need only refer to as the Tyrwhitt Drake estates, stood settled to uses under which William Wykeham Tyrwhitt Drake was tenant for life in possession, C and his eldest son, Herbert William Tyrwhitt Drake, was tenant in fee in remainder. Herbert William was an officer in the Army during the War, as was also his brother, Edward Thomas. Herbert died on Mar. 11, 1915, and, the day before his death, being then, as I have said, entitled, as tenant in fee simple in remainder, to the estates, subject to certain D charges, and to his father's life interest, he made a will. Under that will, after appointing executors and trustees, he gave and devised the whole of his real and personal property, subject to certain legacies, to his brother Edward absolutely "should he survive the dangers of the present War in which he is engaged." Then followed a definition by E the testator of what the termination of the present War was to be, and then he proceeded as follows:

> If my said brother shall not survive the said War but should die before the termination thereof as is hereinbefore defined then the trust property shall from and after the decease of the survivor of myself and my said brother so dying as F aforesaid be held for the purpose of raising and paying thereout an annuity or rentcharge of £1,200 to the widow of my said brother to whom I give and bequeath the same accordingly such annuity or rentcharge to commence from the date of the death of her husband and subject thereto and charged therewith and to the legacies hereinbefore mentioned the ultimate residue of the trust property is to be held for my uncle Percy Tyrwhitt Drake absolutely.

The real name of the uncle was Guy Percival, but I will refer to him as G Percy Tyrwhitt Drake. Some question has arisen as to whether the interest of Edward under that will was contingent or not, but, for the purposes of the present case, I do not think it necessary to go into that question. What is quite certain is that the uncle, Percy Tyrwhitt Drake, under that disposition became entitled to a remainder in fee H simple in the estate, subject, of course, to William Wykeham's life interest, because he was then alive, but contingently upon Edward's dying before the termination of the War. Herbert William, as I have said, died on the day after that will was executed. Edward Thomas was also an officer in the Army. He was married to the respondent, Mrs. Venice Margaret Tyrwhitt Drake, and after his brother's death, namely, on July 21, 1916, the first child, Diana Evelyn, also a respondent, was born. He has in point of fact had three other daughters, who are also respondents to this summons. Now, the family were minded to deal with the family estates in a way different from that provided for A in Herbert William's will, and, on Feb. 15, 1917, an agreement was made, the parties to which were Edward and Percy Tyrwhitt Drake, the respondent Mrs. Venice Tyrwhitt Drake, and two trustees. Mrs. Venice Tyrwhitt Drake was a party in view of the fact that, under the will of Herbert, she was entitled to an annuity charged upon the estates. B That document, after reciting an older disentailing deed under which Herbert became entitled in fee simple subject to William Wykeham's life estate, and after reciting the will of Herbert, proceeded to recite as follows :

> Whereas after certain negotiations it has been agreed between the parties hereto C that notwithstanding anything in the said will contained the said hereditaments shall be settled in manner hereinafter set out and herein contained. . . . 1. So soon as may be an indenture of settlement shall be entered into and executed whereby the hereditaments set out in the said schedule hereto shall be settled in the manner hereinafter described subject to the said life estate incumbrances powers. . . .

D Para. 2 then proceeds to refer to the uses or trusts upon which the property is to be settled in strict settlement. Para. 2 (2) relates to another matter, to which I will refer later. Para. 2 (3) provides for a term limited to the use of the trustees. Para. 2 (4) provides for an annuity by way of jointure of £1,200 to Mrs. Venice Tyrwhitt Drake, E and para. 2 (5) provides for a charge of portions in favour of the younger children of Edward, he being given a power to charge portions up to but not exceeding the sum of £24,000 in all. Para. 2 (6) contains the substantial limitations, and is as follows :

> After the determination of the said life estate [the then-existing life estate of F William Wykeham] and subject to the said provisions for jointure portions and maintenance money the said hereditaments shall be limited to the use of the first and other sons of the said Edward Thomas Tyrwhitt Drake successively according to seniority in tail male with remainder to the use of the said Percy Tyrwhitt Drake for life [Percy Tyrwhitt being Guy Percival] without impeachment of waste with remainder to the use of the first and other sons of the said Percy Tyrwhitt Drake successively according to seniority in tail male with remainder to the first and other daughters of the said Percy Tyrwhitt Drake successively according to seniority G in tail male with remainder to the use of the said Edward Thomas Tyrwhitt Drake his heirs and assigns for ever.

Then there is a power to Edward, if he survives his wife Venice and marries again, to charge portions for the children of such subsequent marriage. Then there is another provision relating to the Cheshire H estate, about which I need not say anything at the moment, and there is a provision that Venice is to release the property from her contingent annuity of £1,200 given by Herbert's will, she having got an annuity not contingent under the earlier provisions of the agreement. Then para. 7 deals with another matter, which I shall refer to on another aspect of this case. That agreement was not immediately followed by any settlement. In fact, a specific performance action was started later, in order to secure the execution of the appropriate settlement, and, pursuant to an order made in that action, the settlement was executed on Mar. 21, 1921.

It is to be noticed that, subject to a possible argument, about which it is not necessary to say anything, the estate of Edward by that time A had become absolute, because he had survived the War. Nevertheless, it is agreed by all the parties that, for that purpose, the really relevant date, for the purpose of the question we have to decide, is to be treated as the date of the original agreement of Feb. 15, 1917, so that that circumstance can be ignored. The settlement is one to which I need B not refer in detail; I will refer to one or two very short things in it only. It contains a recital that:

> as part of certain family arrangements entered into between the parties it has been agreed that notwithstanding anything in the said will [of Herbert] contained the said hereditaments shall be settled in manner hereinafter appearing. C

Then the witnessing part begins, as indeed one would have expected it to begin, in accordance with proper draftsmanship:

> In pursuance of the said agreement and in consideration of the premises the said Edward Thomas Tyrwhitt Drake and Percy Tyrwhitt Drake as settlors according to their respective interests in the premises do hereby grant unto the trustees and their heirs all and singular the freehold castles. . . . D

There are later provisions dealing with copyholds and leaseholds, and the uses are declared. Just to complete the recital of the facts, William Wykeham, the life tenant, died on July 29, 1919, and Edward Thomas succeeded in accordance with the provisions of the agreement. He died on Aug. 31, 1933, but in the meantime Percy Tyrwhitt Drake had died E on June 24, 1928, leaving as his eldest son Thomas, the present appellant. Thomas is, of course, now tenant in tail male in possession. He succeeded to that estate in possession on the death of Edward, in 1933, and the question that arises, so far as his estate is concerned, is this: Was the predecessor, for the purpose of the Succession Duty Act, Edward, F or was it Edward and Percy together?

It is to be noticed that, at the time when Thomas succeeded to his estate in tail male in possession, the event which, under Herbert's will, would have rendered Edward's estate absolute and indefeasible had, of course, already happened, and, in view of that circumstance, as it now G appears, an equally effective disposition of the estates could have been made if Percy had never been a party to it, because it would have taken effect out of what ultimately became the absolute vested indefeasible estate in fee simple of Edward. The same observation applies to the portions, and to the annuity in favour of Mrs. Venice. Edward's estate, H in the light of after events, became an estate sufficient validly, without any assistance from Percy, to charge those portions and validly to charge that annuity.

There is just one more matter of fact which I should mention, and that is that Edward Thomas, who, as I have said, died in 1933, exercised

his power of charging in favour of his four daughters, and, in respect of all those charges, a question also arises as to who is the predecessor. Now, it is convenient, perhaps, at this stage, and in the light of the facts, to summarise in a very concise form the two views that have been presented. On behalf of Thomas, whose interest it is, having regard to his relationship, to attribute his succession, so far as he can do so, to his
A father, Percy, rather than to his cousin, Edward, because the rate of duty would, of course, be different, it is said that, for the purpose of the Succession Duty Act, there were two predecessors, namely, Edward and Percy, and that the case was one where it was not possible to say what proportionate part of his succession was derived from either. It
B is said on behalf of the annuitant, Mrs. Venice Tyrwhitt Drake, and the four children of her and Edward—they, of course, being interested in having it established that their father was predecessor, and that their great-uncle, Percy, was not a predecessor, because by that means they get a lower rate of duty—and on behalf of the Crown, that the pre-
C decessor for the purpose of the Succession Duty Act was Edward, and Edward alone. The difference in the rate of duty makes the matter one of substance, and indeed it is one of some general importance.

Before I come to explain the arguments in a little more detail, I should refer to the relevant sections of the Succession Duty Act, 1853. The
D problem that we have to solve is to find out who is the predecessor. Sect. 2 of the Act is the section which describes the dispositions and devolutions of property which are to confer successions for the purpose of the Act, and it contains definitions of the terms "successor" and "predecessor." It is as follows:

E

> Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation . . . shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a "succession"; and the term "successor" shall denote the person
> F so entitled; and the term "predecessor" shall denote the settlor, disponer, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived.

"Succession" is defined in sect. 1 of the Act as follows:

> The term "succession" shall denote any property chargeable with duty under
> G this Act.

"Property" is to include "real property and personal property." There is just one matter to be observed upon that section, and indeed it is what may be described as a commonplace of the law relating to succession duty: a succession comes into existence when it is created. The pay-
H ment of duty does not fall to be made unless and until the successor or persons become entitled in possession to the property which is the subject-matter of the succession, and, accordingly, one may have a case where a succession is created which does not lead in the event to any payment of duty, for the reason that, under that succession, a successor

never comes into possession, owing to some intervening circumstance. But that does not alter the fact that the succession comes into existence when the disposition is made, and the successor is the person who becomes entitled then under that disposition. Sect. 2 applies, not merely to cases of dispositions made after the Act, but also to dispositions which were, so to speak, current at the date of the Act, i.e., to dispositions A which, being made before the Act, did not, when made, carry these consequences, but automatically fell within the Act immediately it came into operation. The Act coming into operation and being applied to an existing disposition created then and there a succession. I have said that it is a commonplace of the law relating to succession duty that B the succession comes into existence at the date of its creation, although the payment of duty is deferred, and, if authority is needed for that proposition, I need mention only *Lord Advocate* v. *Macalister* (1) and one authority in this court, where the matter again was considered, *A.-G.* v. *Belilios* (2). That, however, does not by itself solve the present C problem, the nature of which will emerge more clearly in a moment. The next section of the Act to which I will refer is sect. 20, which provides that the duty imposed by the Act is to be:

> . . . paid at the time when the successor, or any person in his right or on his behalf, shall become entitled in possession to his succession, or to the receipt of the income D and profits thereof. . . .

That section quite clearly contemplates that the succession had been created previous to the successor's coming into possession, that he was entitled to it from the very beginning, but that his liability to duty arises only if and when he becomes entitled in possession. Sect. 10, E perhaps I should just mention, is the section which provides for differential rates of duty, according to the relationship between the successor and the predecessor. The section under which the question really arises is sect. 13, which provides as follows:

> F Where the successor shall derive his succession from more predecessors than one, and the proportional interest derived from each of them shall not be distinguishable, it shall be lawful for the commissioners to agree with the successor as to the duty payable; but if no such agreement shall be made, the successor shall be deemed to have derived his succession in equal proportions from each predecessor, and shall be chargeable with duty accordingly.

It is noticeable that the word used in that section in relation to the G successor and his succession is the word "derive." That refers us back to sect. 2, which defines the predecessor as the settlor, etc., or other person from whom the interest of the successor is or shall be derived. The date at which that derivation takes place under sect. 2 is quite clearly the date when the disposition is made, and it seems to me that H the period of time which is being contemplated by the word "derive" in sect. 13 is similarly the date at which the succession was first created.

Pausing there, I will state in a little more detail the contentions which arise. Mr. Latter, on behalf of Thomas, says that this is a case which falls within sect. 13, and for this reason: He says that the successor in

this case is Thomas—and, of course, the portioners, but we will leave them aside for the moment, and concentrate upon Thomas, for the sake of simplicity. He has become entitled in possession to his succession within the meaning of sect. 20, and duty is accordingly exigible. From whom did he derive that succession ? Mr. Latter says the answer to
A that question must be given by reference to the same date for derivation as is contemplated by sect. 2, namely, the creation of the succession by the disposition that brought it into existence. Then Mr. Latter says : Looking at the matter at the relevant date, namely, Feb. 15, 1917, from whom could you say as at that date did Thomas derive his succession ?
B Clearly, it is said, from Edward and Percy, because it was only by the joint disposition of the two of them that Thomas's succession was created. It is then said on behalf of Thomas, still keeping the mind fixed on that date : Was it possible to say that we could distinguish the proportional interest derived from each of those two ? That question is answered in
C the negative, because in 1917 it was quite impossible to say whether Edward or Percy would become absolutely and indefeasibly entitled under Herbert's will. Therefore it is said that the proportional interest derived from each of those two was not distinguishable. Then Mr. Latter says that that is sufficient to establish his case. On the other
D hand, it is said that, when the agreement of Feb. 15, 1917, is examined, its true nature and effect is that under it two successions were created—that each of them, Edward and Percy, according to the estate and interest which he had at the time, created a succession, by the joint effect of which, it is true, Thomas became entitled to an indefeasible estate in
E tail male in remainder, but nevertheless that there were two successions, each with its appropriate predecessor, and that, in the events which happened, the successor became entitled to only one of them in possession, that one being, of course, the one derived from Edward, whose estate ultimately became indefeasible. It is said, therefore, that we must treat
F the document of Feb. 15, 1917, in exactly the same way as if these two gentlemen, instead of combining by agreement in one operation, had each of them separately and independently, and without consultation with the other, made a settlement which could be effective only so far as his interest went. And it is said, and I think it is said with truth, although
G it is not necessary to form a conclusive opinion upon the matter, that, had those two, by entirely independent documents, executed at different times, created successions, that would have been a case of two successions with two predecessors, one only of which would have matured so as to attract duty under sect. 20 ; and it is said that the present case must be
H treated as though it were exactly on all fours with that case. If that proposition be correct, I think that the respondents would be entitled to succeed, but, in my opinion, that proposition involves an artificial and inaccurate way of regarding this transaction. Under the document of Feb. 15, 1917, treating that as being the effective document for the purpose, Thomas became beneficially entitled to property, not con-

tingently, but certainly. That appears to me to be the plain common sense of the matter. To say of him that he did not become entitled to his estate in tail male in the Tyrwhitt Drake estates " certainly " under that disposition, but that what he became entitled to were two different estates, one of them an estate which was defeasible if Edward did not survive the War and the other of which was contingent on Edward's A
not surviving the War, appears to me to ignore entirely the reality of the situation and the true effect of what the deed of Feb. 15, 1917, accomplished. The estate of Thomas which he acquired by virtue of that disposition was one which could be acquired by him only by the joint disposition of the two; they alone could effectively confer it upon him, B
and confer it, not contingently, but, following the wording of sect. 2, " certainly." It was the joint effect of what those two together did in making that joint disposition that conferred upon him, in my opinion, " certainly," and not contingently, his estate in the settled property. If that be a true analysis of the position, when I look at sect. 2 and put the C
question which requires to be put under sect. 2—namely, at the date of the settlement, from whom was the then-created interest of Thomas in this property derived ?—it seems to me impossible to say that the interest which he had at that moment was derived from Edward or from Guy. It was derived from the joint action of the two of them, carried into effect D
pursuant to an agreement under which they jointly conferred upon him the interest which he obtained. It seems to me, therefore, that the persons from whom the interest of Thomas was derived were Edward and Percy Tyrwhitt Drake.

But Mr. Spens and Mr. Stamp meet that argument in some such way E
as this. They say that, although it may be true that, at the date of the instrument, the interest which Thomas obtained by it was in effect derived from both Edward and Percy, because at that date it could not be said which of them was the effective disponer, yet that sect. 13 is contemplating the problem there envisaged as arising for solution at the F
date when the payment of duty falls to be made; and it is said that, when the event happens which brings the interest of the successor into possession—in this case, the death of Edward—we must then look to see whether we can say of him that his succession was derived from more predecessors than one; and that, if we do that, we find that, as Percy's G
estate under Herbert's will never vested at all, because the contingency on which it was to pass—Edward's death before the end of the War—never happened, Thomas's estate was derived from Edward, and from Edward alone. It is said that that is not really ascertaining *ex post facto* who the predecessor was, but merely asserting that, of two pre- H
decessors, each of whom had, according to his ability, conferred upon the successor an interest in the property, there becomes relevant to consider only that one whose estate in the event proved to be the estate which effectively produced the interest of the successor. I am unable to construe sect. 13 in that way. It appears to me that the relevant

date at which these matters are to be ascertained is the date when the succession is created, which is the moment when the successor derives his succession. If I be right in thinking that there was only one succession, namely, Thomas's succession, in respect of the absolute indefeasible estate in tail male in remainder—one succession derived from A the joint disposition of two persons—it is, in my judgment, impossible *ex post facto* to dissect the transaction of 1917, and treat it as though it were two independent dispositions, creating two independent successions. I have said that, in my judgment, that is entirely artificial, and, bearing in mind that the construction of the Succession Duty Act is to be rather B what has been described as a popular than a technical one, I am confirmed in my view as to the construction of sect. 2, which, if construed in that way, covers this case, and treats Thomas as obtaining one succession, and one succession only. Directly that is established, it seems to me that sect. 13 must be applied in such a way that the pre- C decessor in respect of that succession is to be ascertained at the date when the succession came into existence. Now BENNETT, J., decided in favour of the contention of the respondent in reliance upon certain authorities. Those authorities have not been very much relied upon by the respondents in this court, but I must deal with them, because the D judge makes them the foundation of his judgment. Those authorities, of which *Braybrooke* (*Lord*) v. *A.-G.* (3) may be taken as typical, were cases of this nature. They deal with the case where a father, who was tenant for life in possession, and his eldest son, who was tenant in tail in remainder, by the usual family arrangement concurred in a disentailing E deed and a resettlement of the estates, under which the father had restored to him his life estate. There was the usual joint power of appointment given to father and son. That is the typical case. There are certain variations upon it in the decided cases, but those variations do not affect the substance of the matter. In such a case, when the F father and the son, in exercise of the joint power of appointment, proceeded to resettle the estates in such a way that the father got back his original life estate, and the son was given a life estate in remainder, the question arose as to whether the life estate of the son was to be treated as derived, to some extent, at any rate, from his father's interest. It G was argued that the exercise of the joint power of appointment was a matter which made the father and the son joint disponers. It was further argued that, the entire interest of both of them having been thrown, as it were, into a melting-pot, and new interests having been created out of them, the new interests so created were referable, not to H the interest of the one, but to the interests of the two of them. Thus, it was said that the life interest of the son must not be treated as referable entirely to his previous estate tail in remainder. In those cases, the House of Lords held that the exercise of the joint power of appointment could be disregarded, as being a mere piece of machinery, and that in effect the life interest of the son, which he obtained by virtue of the exercise of the joint power, must be treated as derived, and derived only, out of his estate tail in remainder, which he had previously had, and was not to be referred in any way or for any purpose to the interest of his father. Now, it appears to me, with great respect, that those cases are of no assistance in the decision of this case. The judge relied upon language that was used in those cases which he considered applied to the A present case. The most important passages which he relied upon were passages from the speech of LORD CRANWORTH in *A.-G.* v. *Floyer* (4), in which *Braybrooke* (*Lord*) v. *A.-G.* (3) was considered. At p. 489 LORD CRANWORTH there says, in reference to *Braybrooke* (*Lord*) v. *A.-G.* (3) :

> The decision of this House shows that in order to ascertain who is the settlor, B within the second section, *i.e.*, the settlor "from whom the interest of the successor is derived," we must inquire not who are the parties by whose conveyance the estate has been created, but who is the conveying party out of whose estate the interest in question has been derived.

The judge gives in his judgment another citation to the like effect, and then proceeds to ask this question, using the language of LORD C CRANWORTH : Out of whose estate were the respective interests of Mr. Thomas Tyrwhitt Drake, Mrs. Venice Tyrwhitt Drake and the infant defendants derived ? He answers that question by saying that they were derived, and derived only, out of the estate of Edward. But when the words of LORD CRANWORTH are read in connection with the D subject-matter with which he was dealing, they do not, to my mind, bear the construction which the judge has put upon them. When LORD CRANWORTH said, "who is the conveying party out of whose estate the interest in question has been derived", he was dealing with a case where the substantial question was : Who was the conveying party out of whose E estate this life interest in remainder taken by the son under the resettlement was derived ? And the answer to it was : Out of his own previous estate tail in remainder, and out of nothing else. That does not seem to me really to have any bearing upon the present problem. The judge, when he applies the test laid down, appears to me not to apply it as it F was applied by LORD CRANWORTH. In fact it was applied by LORD CRANWORTH with reference, and with reference only, to the date when the succession came into existence. But BENNETT, J., interprets the word "derived," not as derived at the date when the succession was created, but as derived at the date when the after event happened, G namely, in this case, the death of Edward. That, in my opinion, is not legitimate, because, as I have already said when I was examining the language of sect. 13, the word "derive" in that section is the same word that is used in sect. 2, and it is contemplating the date when the successor derived his succession, which is the date of its creation. The judge has H interpreted the word "derive" (which, I think, if I may say so, was deliberately used by LORD CRANWORTH, as it is the technical word used in the Act) as applying to a later period, years after the succession was created. With great respect to the judge, I think he has used the language of LORD CRANWORTH in a way that is not legitimate.

There remains only one other matter to deal with, and that is an argument which Mr. Spens put forward to this effect. He said that, when the relevant document in this case is examined, and when certain evidence is looked at, the true nature of the transaction which took place in 1917 was not a joint settlement by uncle and nephew of the family estates, but a transaction under which the nephew bought out his uncle, purchased for consideration his uncle's contingent interest, and then proceeded himself to effect the settlement, and that notwithstanding the circumstance that, on the face of the document, the uncle appears as one of the settlors. Now, the circumstance in the transaction itself on which this argument is founded is that, under the agreement of 1917, the uncle, Percy, was to be paid outright a certain sum of £10,000, which was part of a sum of £15,000 appointed to Edward by his father under an overriding power to charge portions in favour of younger children, Edward at that date being a younger child, because his brother Herbert was still alive. Under the agreement, Edward gave to Percy, his uncle, £10,000 absolutely out of that £15,000. There was also a provision under which certain estates known as the Cheshire estates were released by Percy, who had exactly the same contingent interest in them under Herbert's will as he had in the other estates, and released and transferred absolutely to Edward. It is said that this was really a commercial transaction under which Percy was in effect paid out. All I need say about that is that I entirely agree with the conclusion of the judge upon that point. It appears to me that the document, on the face of it, is one which is not consistent with the argument, and that, moreover, if the evidence is looked at, it really negatives the existence of any such arrangement between these parties. The real substance of the matter was that the position was not at all one in which persons interested in the preservation of family property would care to be. Two persons who alone could produce an effective resettlement combined to do so, and they did so by this arrangement. I cannot read the transaction as being anything else than an arrangement under which these two pooled their resources, so to speak, and made an effective resettlement of the family estates; and to treat Edward as the sole settlor, on the footing that he bought his uncle out, appears to me to be to misunderstand the whole transaction. That being so, the decision of the judge cannot stand, and there must be an appropriate declaration, the actual terms of which can be discussed later.

Romer, L.J.: Upon the question whether, in the circumstances, the case is to be treated as though Edward Thomas purchased the contingent interests of Percival, and so, having become entitled in any event to the property, settled that property in the way indicated in the settlement of 1921, I agree with the decision arrived at by Bennett, J., for the reasons given by him, and also for the reasons just given by Sir Wilfrid Greene, M.R. It appears to me that it is no more possible to say that Edward Thomas bought out Percival and then settled the entirety than it is possible to say that Percival bought out the interests of Edward Thomas and himself settled the entirety. Plainly, the truth of the matter is, I think, whether one looks at the settlement alone or looks at the settlement in the light of the surrounding circumstances, that neither one bought from the other, but that both, being together entitled to an absolute interest in the property, joined together in settling that property in the manner that has been described by Sir Wilfrid Greene, M.R. But I am unable to agree with the judge in the conclusion at which he arrived upon the question: Who is to be considered as the predecessor in the present case? In considering that question, it is essential to bear in mind that, for the purpose of the settlement and the Succession Duty Act, the succession arises at the date that the disposition creating the succession comes into force. That has been pointed out in several cases, and I do not think that it is really disputed by anybody in this court. In *Wolverton* v. *A.-G.* (5), I find Lord Herschell saying this, at p. 547, in relation to a case where the testator bequeathed his residuary estate after the death of Lady Wolverton upon certain co-heiresses:

> There can be no doubt, as was admitted by the Crown, that the disposition by the testator by reason whereof the co-heiresses became entitled to his residuary estate upon the death of Lady Wolverton conferred a succession, and that they became "successors" and the testator their "predecessor" within the meaning of sect. 2 of the Succession Duty Act. I take it to be equally clear that the succession came into existence as soon as the testator died, and that its creation was not postponed until the death of the tenant for life. Indeed, this was admitted by the Solicitor-General as soon as his attention was called to the terms of the section making it applicable to past dispositions.

In what I was saying just now, I was, of course, referring only to dispositions that took effect after the coming into operation of the Succession Duty Act. Again, Lord Herschell said, at p. 548:

> The words of sect. 10 are precise: "There shall be levied and paid to Her Majesty in respect of *every* such succession as aforesaid" the following duties; and these are made dependent on the relationship of the predecessor and successor. This provision operates, in my opinion, as soon as the disposition is made by which a "succession" is conferred.

The same point is emphasised in the other case to which Sir Wilfrid Greene, M.R., has referred, that of *A.-G.* v. *Belilios* (2). In that case I find that Sargant, L.J., said, at p. 822:

> It is important to observe that under the Act of 1853 a succession is constituted, if at all, immediately on the death of the testator, and not on the death of the tenant for life, or other limited owner, on whose death the successor becomes entitled in possession; and the succession duty attaches immediately on the earlier event, and is merely postponed as to payment till the later event.

I therefore approach this case in the light of those authorities, and, so approaching it, I confess that it seems to me plain that, when the settlement of 1921 came into operation, for the purpose of this case we are to treat it as though it came into operation in 1917, when there was created in favour of Thomas—and, like Sir Wilfrid Greene, M.R., for the sake of simplicity I am going to consider only Thomas, and not the daughters of Edward—an estate tail in remainder, a vested estate. That arose immediately the settlement came into operation, and, coming into operation then, arising as it did then, it must be possible to say who at that time was the predecessor from whom that succession was derived. As I have already said, on the coming into operation of the settlement, Thomas became entitled to a vested estate in tail male in remainder. Through whom was that vested estate derived ? Obviously not from Edward alone ; obviously not from Percival alone. If Mr. Spens and Mr. Stamp ask us to assume that this really had happened, if each one of them separately had settled his contingent interests in the way indicated in the settlement of 1921, Thomas would not have become entitled under either to a vested estate in tail male in remainder. He would have been entitled under each to a contingent estate in tail male in remainder. To make that clear, one must refer to the definition of "succession" in the Act of 1853, and "succession" is there defined as being "shall denote any property chargeable with duty under this Act." Turning to sect. 42, one finds that the duty imposed by the Act is constituted a first charge on the interest of the successor in the property, whether real or personal. That is the subject-matter of the disposition, and, therefore, in sect. 2 a succession means an interest—whether it is contingent or vested does not matter, as the section indicates—in the property, whether real or personal, subject to the settlement, which interest is charged by sect. 42. It is plain there, I say, that the interest which is charged under the Act would, in the case of there being one settlement, be an interest totally different from the interests charged under the Act if we are to concede that there were two settlements made. That being so, it seems to me that there can be only one answer to the question : From whom was that vested interest in remainder derived ? It can have been derived only from the two operating together. Therefore, it appears to me that this is a case where the succession—that is to say, the interest in the property charged in the Act—has been derived, not from Edward alone, nor from Percival alone, but from the two together. Further, if, as I think is the case, it must be possible, at the date when the disposition comes into force, to say who is the predecessor, it must be possible to say at that time what is the rate of duty to be charged. The amount of duty actually payable will not be ascertained, if it ever falls to be ascertained at all, until the succession falls into possession.

I might mention, in reference to sect. 13, that it seems clearly to contemplate the possibility of there being a disposition creating a succession in property made by more than one predecessor whose interests are distinguishable. The section, however, is referring to a succession only. A succession, therefore, is contemplated by the Act as being created by two or more predecessors, whose interests are distinguishable. That is a position which, it appears to me, could never arise if the contention put forward by Mr. Spens and Mr. Stamp be accepted, because, if two or more people join together in making a disposition of property, each of those persons having a distinguishable interest in the property, according to the argument that we have heard there is not one succession created, but a number of successions created, equivalent in number to the number of the persons who join together in this transaction.

For these reasons, in addition to those that have been given by SIR WILFRID GREENE, M.R., I have come to the conclusion that in this case the predecessors were Edward and Percival together, and that, their interests being indistinguishable, sect. 13 comes into operation.

MACKINNON, L.J.: I agree, and I do not think that I can usefully add anything.

Order of BENNETT, J., *discharged as regards Thomas and the infants. Declaration that E. T. T. Drake and G. P. T. Drake were the predecessors from whom the interests of Thomas and the infants were derived, and that the proportional interest derived from each of them was not distinguishable. Order of* BENNETT, J., *as to costs to stand. Appellants' costs of the appeal as between party and party to be paid by the Crown. Trustees' costs and the costs of Mrs. Venice Tyrwhitt Drake to be taxed as between solicitor and client and paid out of the estate. Leave to appeal to the House of Lords, the costs of the respondents to that appeal to be provided for in any event.*

Solicitors: *Bircham & Co.* (for the plaintiffs and for Mrs. Venice Tyrwhitt Drake and her children); *Blyth, Dutton, Hartley & Blyth* (for Captain Thomas Tyrwhitt Drake); *Solicitor of Inland Revenue* (for the Attorney-General).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

BYNOE *v.* GENERAL FEDERATION OF TRADE UNIONS APPROVED SOCIETY (110).

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Romer and MacKinnon, L.JJ.), **October 28, 29, 1937.**]

Work and Labour—National health insurance—Dentistry—Medical practitioner not on dentists' register—Right to give dental treatment to member of approved society—Dentists Act, 1921 (*c.* 21), *s.* 1 (3) (*a*)—*Dental Benefit Regulations,* 1930 (*S.R. & O.,* 1930, *No.* 1060), *regs.* 2, 21 (1).

The plaintiff, a legally qualified and registered medical practitioner, whose name was not on the dentists' register, gave dental treatment to a member of the defendant society, an approved society within the National Health Insurance Acts, 1924 to 1932. He then sent to the defendant society an account of his charges, which the society refused to pay:—

HELD: (i) although the plaintiff was, under the Dentists Act, 1921, entitled to practise dentistry, he was not a "dentist" within the Dental Benefit Regulations, 1930, from whom a member of an approved society was entitled to obtain dental treatment, and he was not, therefore, a person who could send in charges and obtain payment of them from the approved society.

(ii) the regulations, which confined the giving of dental treatment to those persons who were dentists as defined by the regulations, were not *ultra vires.*

Decision of SIMONDS, J., [1937] 3 All E.R. 397, *affirmed.*

[EDITORIAL NOTE. The Court of Appeal have upheld the decision that a registered medical practitioner, who is not also on the dentists' register, is not A entitled to recover payment under the National Health Insurance Act and the regulations thereunder in respect of dental treatment given to a panel patient.

AS TO MEDICAL and DENTAL BENEFIT, see HALSBURY, 1st Edn., Vol. 28, Work and Labour, pp. 946, 947, para. 1682 ; and FOR CASES, see DIGEST, Vol. 44, pp. 1312, 1313, Nos. 163-169.]

B APPEAL by the plaintiff from the decision of SIMONDS, J., given on June 18, 1937, and reported [1937] 3 All E.R. 397. The facts and arguments appear from the judgments herein and in that report.

The appellant appeared in person.

Alexander Grant, K.C., and *A. de W. Mulligan* for the respondents.

C

SIR WILFRID GREENE, M.R. : Mr. Bynoe is a registered medical practitioner, who has practised for many years. He tells us that, for the last 39 years of his life, he has been confining himself to the practice of dentistry, a thing which he is perfectly entitled to do under the law. D The statutory provisions with regard to the practice of dentistry are, for the present purposes, to this effect. A person who is a duly and legally qualified registered medical practitioner is entitled to practise dentistry notwithstanding the fact that he is not a dentist registered in the Dentists' Register kept under the Dentists Acts, beginning with E the Act of 1878. For present purposes, there are two classes of persons entitled to practise as dentists in this country, (i) those who are registered in the Dentists' Register, and (ii) those who are duly qualified and registered medical practitioners, who are entitled to practise dentistry notwithstanding that they are not on the register.

F When the National Health Insurance Acts were passed, the benefits which were thereby secured for insured persons were to be administered through approved societies. From the point of view of the professional man who is going to assist in the administration of benefits—for example, medical benefits in the case of a doctor—he, under the scheme of the G Act, becomes entitled to obtain his remuneration, not from the patient whom he treats, but from the society to which that patient belongs. That is the broad scheme for administration of benefits. Dental benefit, which is what is called an additional benefit under the Acts, is administered in the same way. There is a special kind of administration under H which the doctor or the dental practitioner, as the case may be, obtains his remuneration, not from his patient, but from the society. Parliament, in providing for that scheme of administration, thought fit to say that it is to be worked in the case of dental benefit, which is an additional benefit, only by one out of those two classes of dental practitioners which I have mentioned, namely, the dentist duly registered in the Dentists' Register. Parliament has not thought fit to extend its provisions to the case of a duly qualified and registered medical practitioner entitled to practise dentistry but not in fact on the Dentists' Register. Parliament might have done otherwise if it had thought it right, but, for reasons which we can assume to have been good reasons, it has decided to confine the working of those schemes, in the case of A dental benefit, to that particular category of persons entitled to practise dentistry consisting of those whose names appear on the Dentists' Register. In Mr. Bynoe's case, the effect of that is obviously very unfortunate, from his point of view, because, his practice being entirely a practice in dentistry, he finds himself precluded from being employed, B in the case of dental benefit under these schemes, in such a way that he can call upon the approved society to pay him his fees. If any member of an approved society chose to employ Mr. Bynoe outside the Act altogether, and outside the schemes under it, there is nothing to prevent him from treating such a person, and in that case, of course, C he would be entitled to recover his fees from the patient. Nothing that the Insurance Act has done has altered that state of affairs. But the practical result, from Mr. Bynoe's point of view, is that in practice the insured person, who has been paying contributions in order to have the benefit of the Insurance Act, is not going to give himself the luxury D of paying privately for private treatment, and he, naturally, goes for his dental treatment to a dental practitioner whose fees will be covered by the scheme and provided for under the scheme by the society to which he belongs. Accordingly, an insured person who requires dental treatment would, in a normal case, choose a duly registered dentist on the E Dentists' Register, because he is the only kind of dentist who comes under the scheme. The effect on Mr. Bynoe can be well understood, if, as I gather from what he says, his practice has been very largely among persons who fall under the provisions of the National Insurance Act. F

But I must look a little more closely at the structure of the law with regard to this matter. I should be content to say that I agree with the careful judgment of the judge, and add nothing to it, but, to make this judgment complete, I must say a little more. The schemes for dental benefit are provided out of surpluses which appear on the valuations G of societies. Sect. 75 (2) of the Act of 1924 provides that:

> A scheme [for additional benefits] made under this section may determine the conditions to be complied with as respects the additional benefits. . . .

Then, in the later Act of 1928, by sect. 16 (3) it is provided that:

> Regulations may be made with respect to the administration of schemes under H this section and of any additional benefit. . . .

It is under that power to make regulations, and under the general power to make regulations in the Act, that what are called the "National Health Insurance (Dental Benefit) Regulations" were made. Before passing from sect. 16 (3) of the Act of 1928, I should just mention that there is this proviso which limits the power to make regulations in a particular not relevant to the present case :

> Provided that such regulations shall not restrict the right on the part of any insured person to obtain treatment from any practitioner, clinic or other institution with whom arrangements with respect to that form of treatment have been made in accordance with the regulations.

Mr. Bynoe appears to be under the impression that that proviso in some way prohibits the making of regulations which would prevent an insured person from obtaining treatment from him. What he has failed to observe, however, is that that proviso does not apply to *any* practitioner, but only to practitioners with whom the arrangements specified have been made. Therefore, the proviso does not apply to him.

The rule-making power is one which, very fully and very widely, gives power to make these regulations. These regulations, when the procedure laid down in the Act has been gone through, have, as the judge points out in his judgment, according to the language of the Act, effect as if enacted in the Act. That is what Parliament has provided. Mr. Bynoe, I hope, will appreciate that a regulation made under the authority of an Act of Parliament, which provides that the regulation, when made, shall have the force of an Act of Parliament, has the force of an Act of Parliament, provided that it is not *ultra vires* ; and, in some cases, even if it is *ultra vires*, it will have the force of an Act of Parliament. But in this case I can see no ground for the suggestion that these regulations are *ultra vires*. It appears to me to have been perfectly competent to the authority entrusted with the power of making regulations to provide that the particular and special machinery relating to the administration of benefits under the Insurance Act should come into operation only in the case where the dental practitioner is a registered dentist on the Dentists' Register. That has been done quite clearly, because the definition clause, in para. 2 of the regulations, defines " dentist " as meaning a person who is duly registered on the Dentists' Register kept under the Dentists Acts of 1878 and 1923, or any Act amending those Acts. Mr. Bynoe is not a dentist so registered, and, therefore, he cannot obtain the benefit of the Act or that of the provision in para. 21 of the regulations, which thus provides for free choice of dentist :

> (1) Subject to the provisions of these regulations a member [of an approved society] shall be entitled to obtain dental treatment from any dentist who is prepared to provide such treatment . . .

" Dentist " there means, and means for the purposes of these regulations, a registered dentist, and nobody else. It does not include a duly qualified and registered medical practitioner who is entitled to practise dentistry, unless he is on the Dentists' Register.

That is the short answer to this case. As I have said, the judgment of the judge is manifestly right. I have delivered a rather more elaborate judgment than I otherwise should have done only in the hope, as I have said, that Mr. Bynoe, with the assistance of my judgment and that of the judge, and the judgments of my colleagues, will be satisfied that the Act of Parliament has the effect which I have stated.

ROMER, L.J. : No one who has heard the facts of this case can help feeling considerable sympathy with Mr. Bynoe on the position in which he finds himself, but we have to administer the law as we find it. We have nothing at all to do with the wisdom or justice of that law, and I fear it is only too clear that the effect of the Acts and regulations to which our attention has been called is that which SIMONDS, J., and now SIR WILFRID GREENE, M.R., have stated it to be. I agree that this appeal fails.

MACKINNON, L.J. : I agree. Mr. Bynoe's grievance arises by virtue of the definition of " dentists " in para. 2 of the Dental Benefit Regulations, S. R. & O., 1935, No. 644. We have not heard Mr. Grant, and I do not know whether it would have been possible for him to suggest any reason why that definition was framed in the words which are used, but, in the absence of any such explanation, it does appear to me that Mr. Bynoe has a very real grievance. I observe, from the Dentists' Act, 1921, that a person is entitled to become admitted as a registered dentist, or to be on the register of dentists, provided merely that he has attained the age of 23 years, that he has a good personal character, and has, for 5 out of the 7 years before the commencement of the Act, been engaged, as his principal means of livelihood, in the practice of dentistry in the British Isles. That appears to me to suggest the provision of an educational equipment for the practice of dentistry much inferior to that which would be inferred from the fact that a man has become a registered medical practitioner under the Medical Acts. None the less, a man of that apparently minor qualification, having become a registered dentist, is, by virtue of this definition, privileged to enjoy the advantages accruing under the National Health Insurance Acts, whereas Mr. Bynoe, who is a registered medical practitioner, is denied those benefits. As I say, there may be some reason that is not apparent to me for this form of definition, but, in the absence of such reasons, I should suppose that this definition was so framed merely by mistake, and it ought to be framed in these terms :

> " Dentist " means a person who is duly registered on the Dentists' Register, kept under the Dentists Acts, 1878 to 1923, or a person who is entitled to use the name dentist and to practise dentistry pursuant to the said Acts.

If that form of definition had been used, Mr. Bynoe's grievance would have disappeared. But, as the matter stands, those words not having been added to the definition, we have no option but to say that Mr. Bynoe's grievance, however real it may be, is one for which we can provide no remedy. I agree that, on the Acts of Parliament and the regulations as they stand, we have no option but to dismiss this appeal.

Appeal dismissed with costs.

Solicitors : *Vivian J. Williams & Co.* (for the respondents).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

COLLINS *v.* FELTHAM URBAN DISTRICT COUNCIL.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., du Parcq and Hilbery, JJ.), **July 26, 1937.**]

Town Planning—Land scheduled as open space—Claim for compensation—Basis of computation—Whether loss of building profits also recoverable—Acquisition of Land (Assessment of Compensation) Act, 1919 (*c.* 57), *s.* 2 (2)—*Town and Country Planning Act,* 1932 (*c.* 48), *s.* 10 (6).

An owner of building land, which was scheduled as an open space under the Town and Country Planning Act, 1932, claimed compensation under the Acquisition of Land (Assessment of Compensation) Act, 1919, which, he contended, should include, in addition to the ordinary market value of the land, the loss he had sustained by being deprived of the profit he expected to make by the erection of houses on the land :—

HELD : compensation could be paid only in respect of the ordinary market value of the land being " the amount which the land if sold in the open market by a willing seller might be expected to realise," as provided by sect. 2 (2) of the Act of 1919, and that would not include any compensation for the loss of profit expected to be made by its development as building land. Interest on the amount of compensation was payable as from the date of the arbitrator's award only, and not from any earlier date.

[**EDITORIAL NOTE.** The Town and Country Planning Act, 1932, s. 10 (6), provides for compensation where land suitable for immediate development is reserved for an open space. In such a case the compensation is the price which the land would fetch in the open market, without any specific allowance for loss of the profit that would be made by its development.

FOR THE TOWN AND COUNTRY PLANNING ACT, 1932, s. 10, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 25, pp. 482-484.]

SPECIAL CASE stated by an official arbitrator under the Acquisition of Land (Assessment of Compensation) Act, 1919, s. 6 (1). The Town and Country Planning Act, 1932, s. 10, deals with interim developments orders and after providing for an appeal to the Minister of Health by any person aggrieved by the refusal of a local authority to consent to his application, or by any conditions imposed by them, enacts in sub-sect. (6) as follows :

> Where an appeal to the Minister under [sect. 10 (5)] is dismissed on the ground only that the land to which the appeal relates, though otherwise suitable for immediate development, ought to be reserved by the scheme for a public open space, and the Minister is satisfied that, if the appeal had been allowed, the development for which permission was sought would have taken place within a reasonable period, the appellant, if he is entitled to dispose of the fee simple of the land with vacant possession, may, by notice in writing given to the authority within six months from the date of the Minister's decision, require the authority to purchase the land at a price to be agreed, or in default of agreement to be determined in accordance with the provisions of the Acquisition of Land (Assessment of Compensation) Act, 1919, and the authority shall purchase the land accordingly.

By virtue of the Town and Country Planning Act, 1932, the Feltham Urban District Council on May 27, 1935, passed a resolution to schedule an area of about 33 acres of building land, known as the Glebe Estate, Feltham, as an open space. The council having refused permission to the owner to develop the land as a building estate, he appealed to the Minister of Health, who dismissed the appeal, but declared that he was satisfied (for the purposes of sect. 10 (6) of the Act of 1932) that, if the appeal had been allowed, the land would have been developed as a building estate within a reasonable period. Thereupon the owner gave written notice to the council requiring them, pursuant to sect. 10 (6) of the said Act, to purchase the land, at a price to be agreed, or, failing agreement, at a price to be determined under the Acquisition of Land **A** (Assessment of Compensation) Act, 1919. He claimed the sum of £26,947 as compensation, but, as the parties could not reach agreement, the matter was referred to arbitration. At the hearing, it was proved or admitted that previously the claimant had purchased 39½ acres of the Cross Estate, Feltham, and had sold 462 houses, and thereafter had **B** resolved to erect 271 houses on part of the 33 acres of the Glebe Estate. After the submission of plans in respect thereof, the council's said resolution to schedule the land as an open space was passed, although previously the land had been scheduled as available for general building purposes to the extent of 12 houses to the acre. No alternative land was **C** available in the district for similar building. The owner gave evidence that he had already arranged to sell 6 of the houses to be erected. He contended that the council's resolution had prevented him from erecting 271 houses, with the result that he had lost the profit which would have arisen therefrom, and sought to recover the amount of that profit, in **D** addition to the ordinary market value of the land.

The following questions were submitted by the official arbitrator for the opinion of the court : (*a*) whether the claimant is entitled in law to be paid compensation, on the basis that he is entitled to recover (in addition to the ordinary market value of the land) the loss he has **E** sustained by being deprived of his anticipated profit in respect of houses he would have erected on the said land ; or (*b*) whether the claimant is entitled at law to be paid compensation in respect only of the ordinary market value of the said land ; and (*c*) whether the claimant is entitled at law to be paid interest on the compensation awarded from Oct. 3, **F** 1935, being the date of the certificate of the Minister of Health that development of the land would have taken place within a reasonable period ; or (*d*) whether the claimant is entitled at law to be paid interest on the compensation awarded only as from the date of this award. The arbitrator assessed compensation under (*a*) at £20,526, and under (*b*) **G** at £13,326.

W. C. Cleveland-Stevens, K.C., and *S. P. J. Merlin* for the claimant.

R. M. Montgomery, K.C., and *J. Ramsay Willis* for the Feltham Urban District Council.

H

LORD HEWART, L.C.J. : In our opinion, the answers to the questions submitted for the opinion of the court by the official arbitrator are these : To the first question the answer is No ; to the second question the answer is Yes. With regard to that answer, I will add only that it is agreed at the bar that the words " ordinary market value of the land " mean precisely what is meant by the words in the Acquisition of Land (Assessment of Compensation) Act, 1919, s. 2; that is to say, " the amount which the land if sold in the open market by a willing seller might be expected to realise." It is common ground that the introduction of the epithet " ordinary " does not in the smallest degree vary the provisions of sect. 2 (2) of the statute. To return to the arbitrator's questions, the answer to the third question is No, and the answer to the fourth question is Yes. Those questions being answered in that way, the appropriate consequences are set out by the official arbitrator in the case.

Solicitors: *Richard D. Leigh* (for the claimant); *Williams & Poole* (for the respondents).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

CONYBEAR *v.* BRITISH BRIQUETTES, LTD.

[CHANCERY DIVISION (Bennett, J.), **October 27, 28, 1937.**]

Companies—Transfer of shares—Registration—Refusal to register—Duly stamped—Voluntary transfer—No adjudication.

Revenue stamp—Stamp duties—Voluntary conveyance—Necessity for adjudication.

Those in control of the defendant company were desirous of converting it into a private company, and the plaintiffs were anxious to prevent this being done. With this purpose in view the plaintiffs executed 44 transfers, each being a transfer of five £1 shares for a stated consideration of £5. Each transfer was stamped 1*s.* (which is the correct duty on a transfer for £5), but bore no adjudication stamp. It was proved that no consideration money passed, and that the transfers were not transfers upon a sale of the shares. The company refused to register the transfers for the reason that they were not duly stamped:—

HELD: (i) the company was justified in refusing to register the transfers. The transfers, not being conveyances on sale, must be stamped either as voluntary conveyances, in which case the Finance (1909-10) Act, 1910, s. 74 (2), required that the stamp duty should be adjudicated, or under the Schedule to the Stamp Act, 1891, as conveyances or transfers of any kind not thereinbefore described, in which case that Act required them to be stamped 10*s.*

(ii) following *Maynard* v. *Consolidated Kent Collieries Corpn.* (1), the directors, in considering whether the transfer was duly stamped, were entitled to go behind the consideration stated in the transfer.

[**EDITORIAL NOTE.** This case, which is of obvious interest to those concerned with company law, is also of interest to conveyancers. It should be compared with *Re Weir and Pitt's Contract* (1911), 55 Sol. Jo. 536; 39 Digest 284, *668*; and reference should be made to the note upon this subject in HALSBURY, LAWS OF ENGLAND, 1st Edn., Vol. 24, pp. 732, 733, note (*b*). The matter seems now to stand thus: If a document has been stamped in respect of a consideration which is substantial and a genuine element in the transaction, it may be duly stamped although that consideration is less than the actual value of the property transferred and the duty has not been adjudicated. On the other hand, it is clear that, where the transfer is, as in the present case, purely voluntary, then the document, although it may be stamped in respect of the value of the property transferred, cannot be accepted unless it also bears an adjudication stamp.

AS TO STAMPS ON VOLUNTARY DISPOSITIONS *inter vivos*, see HALSBURY, 1st Edn., Vol. 24, Revenue, pp. 732-734, para. 1574; and FOR CASES, see DIGEST, Vol. 39, pp. 284, 285, Nos. 667-671.]

Case referred to:

(1) *Maynard* v. *Consolidated Kent Collieries Corporation*, [1903] 2 K.B. 121; 39 Digest 255, *396*; 72 L.J.K.B. 681; 88 L.T. 676. A

ACTION against a limited company claiming an order that certain transfers of shares be registered, and an injunction to restrain, pending such registration, the holding of an extraordinary general meeting. The facts and arguments are fully stated in the judgment. B

W. P. Spens, K.C., and *Maurice Berkeley* for the plaintiffs.

Wynn Parry, K.C., and *W. G. Brown* for the defendant company.

BENNETT, J.: There are four plaintiffs, William George Conybear, T. P. Rose Richards, Ltd., William Leo Kelleher, and Henry Thomas Box, all shareholders in the defendant company, British Briquettes, Ltd., and the relief that they claim in the writ is: C

> An order that the defendant company by its directors or secretary do register the 44 transfers of shares in the defendant company the particulars of which are mentioned in the schedule hereto into the names of the respective transferees named in such transfers and that the register of members of the defendant company be rectified accordingly. D
>
> An injunction to restrain the defendant company, its secretary, directors and agents pending the registration of such transfers and such rectification of the said register as aforesaid from (*a*) holding or allowing to be held an extraordinary general meeting of the defendant company convened by notice dated Mar. 17, 1937, for Apr. 12, 1937, or (*b*) convening or allowing to be convened or held any meeting of the defendant company for the purpose of passing the resolution set forth in such notice or any resolution for the purpose of converting the defendant company into a private company. E

The defendant company was incorporated in the year 1929, under the Companies Act, as a company limited by shares, with a capital of £2,000,000, divided into 1,000,000 preference shares of £1 each and 1,000,000 ordinary shares of £1 each. All the preference shares, and 960,008 ordinary shares, have been issued, and are fully paid up. Mr. Conybear is registered as the holder of 767 of the preference shares and of 1,233 of the ordinary shares; T. P. Rose Richards, Ltd., is registered as the holder of 958 of the preference shares and of 1,542 of the ordinary shares; Mr. Kelleher is registered as the holder of 767 of the preference shares and of 1,233 of the ordinary shares; and Mr. Box is registered as the holder of 330 of the preference shares and of 530 of the ordinary shares. The company is a public company, and there is no restriction imposed upon the right of the holder of fully-paid shares to transfer them. Art. 36 of the articles of association of the defendant company provides that: F G H

> Every instrument of transfer shall be presented, duly stamped and executed, to the company, accompanied by the certificate of the shares to be transferred, and such other evidence as the directors may require to prove the title of the transferor, or his right to transfer the shares. All instruments of transfer which shall be registered shall be retained by the company, but any instrument of transfer which

the directors may decline to register shall on demand be returned to the person depositing the same.

In Aug., 1936, an offer was made by the Powell Duffryn Associated Collieries, Ltd., through the chairman of the defendant company, to purchase from the holders of shares in their company all the preference
A and ordinary shares, and the price offered was 11*d*. for each preference share and 1*d*. for each ordinary share. The chairman of the defendant company was the agent through whom that offer was made, and by him, as appears from the correspondence, it was communicated to all the shareholders in the defendant company, and was open for acceptance
B until (I think) Sept. 30, 1936. The plaintiffs did not accept the offer. In Mar., 1937, there was a general meeting of the company, the eighth annual general meeting, and in the course of his speech the chairman stated that it was intended to convert the defendant company into a private company, a step which, if approved by the necessary majority,
C they were entitled to take. The plaintiffs apparently did not desire the defendant company to be converted into a private company, and, with a view to making it impossible to convert the defendant company into a private company, they executed transfers of some of their shares. In all, by the four plaintiffs, there were 44 transfers executed, and each
D transfer was a transfer of 5 fully-paid ordinary shares. The plaintiff Mr. Box executed 19 transfers, each of 5 shares; T. P. Rose Richards, Ltd., 9, Mr. Conybear 8, and Mr. Kelleher 8. Each transfer was in the common form, and one of the transfers executed by Mr. Box reads as follows:

E I, Henry Thomas Box, of 130, Bute Street, Cardiff, in consideration of the sum of £5 paid by Irene Lilian Gentle, of 11, Plasturton Gardens, Cardiff, married woman, hereinafter called the said transferee, do hereby bargain, sell, assign and transfer to the said transferee (5) five ordinary shares of £1 each, fully paid, numbered 341,698 to 341,702 of and in the undertaking called the British Briquettes, Ltd., to hold unto the said transferee, her executors, administrators and assigns, subject to the several conditions on which I held the same immediately before the execution
F hereof; and I, the said transferee, do hereby agree to accept and take the said shares, subject to the conditions aforesaid.

The other 43 transfers were in the same form, but to different transferees, and in respect of shares of different consecutive numbers; but, as I have said, each transfer was expressed to be in consideration of the payment
G of the sum of £5 by the transferee to the transferor. Each transfer had impressed upon it an Inland Revenue stamp of 1*s*. The 44 transfers were all sent to the defendant company, and were in the possession of the defendant company on Mar. 15, 1937. There were also sent to the defendant company with the transfers the certificates relating to the
H shares to be transferred, and the fee payable upon registration. On Mar. 17, 1937, the defendant company gave notice to its shareholders of an extraordinary general meeting to be held on Apr. 12, 1937, for the purpose of passing the necessary resolutions to convert the defendant company into a private limited company. On Mar. 25, the secretary of the defendant company wrote to Messrs. Gilbert Robertson & Co., the

solicitors for the plaintiffs, or for some of them, a letter in which he stated as follows:

> I am further instructed to inform you that even if the board were to meet before the extraordinary general meeting it clearly would not be prepared to pass transfers which would have the effect of rendering impossible a proposition for the consideration of which a general meeting of the company has been convened for a few days hence.

The defendant company has not registered the transfers.

On Apr. 6, the writ was issued, claiming the relief which I have already read. Para. 2 of the defence sets up the following plea:

> The defendant company denies that any of the transfers of shares referred to in para. 5 of the statement of claim were or are duly stamped. None of the said transfers was a transfer on sale of the shares comprised therein in consideration of the sum of £5 or any other sum, but all the said transfers were and were to the knowledge of the plaintiffs and of the defendant company and its directors and officers transfers of shares by the several plaintiffs to persons who paid no consideration for the shares transferred to them and would, if the said transfers were registered, hold the shares as mere nominees of the several plaintiffs. Save as aforesaid, para. 5 of the statement of claim is admitted.

In their reply, delivered on July 7, 1937, the plaintiffs in para. 2 say:

> With reference to para. 2 of the defence, the plaintiffs admit as regards each of the transfers therein referred to that no sum was actually paid by the transferee therein named to the transferor therein named in respect of such transfer and further that in the case of each of the transfers by the plaintiff Box the transferee therein named executed a blank transfer of the shares therein comprised and such blank transfer was retained by, and is still in the possession or power of, the said plaintiff. Save as aforesaid, the plaintiffs make no admissions with reference to para. 2 aforesaid but say that each of the said transfers was an absolute transfer of the shares therein comprised, that *ad valorem* stamp duty on the full value of the shares comprised in such transfers was paid in respect thereof before such transfer was lodged with the defendants for registration, that the defendants had no notice of any trust of any of the shares comprised in any such transfer and that no such trust was, or has been, in fact created, and that in any event it is no concern of the defendants whether the consideration mentioned in any such transfer had or had not actually been paid nor does the payment or non-payment of such consideration affect the case.

On Oct. 20, the plaintiffs' solicitors wrote a letter to the defendants' solicitors making the following further admissions in addition to those contained in the reply:

> (1) That the whole of the shares transferred by the plaintiffs Conybear, T. P. Rose Richards, Ltd., and W. L. Kelleher were transferred to members of the said plaintiff company or other employees of such company and/or to their wives. (2) That the plaintiffs Conybear and Kelleher are directors of, or otherwise associated with, the plaintiff company. (3) That the transferees from each of the said plaintiffs were asked by such plaintiff to accept a transfer of the shares transferred to them respectively. (4) That no arrangement was made by any of such plaintiffs with any of such transferees either verbally or in writing or at all that any of the shares transferred should be re-transferred to the transferor thereof or otherwise dealt with on the instructions of the transferor thereof or of the plaintiffs or any of them. (5) That in the case of the plaintiff Box the transferees from him were merely asked to accept transfers of the shares transferred to them respectively and to sign the blank transfers which have been disclosed. (6) That, save as abovs or in the reply stated, no arrangement whatsoever was made between the plaintiffe or any of them and the transferees from the plaintiffs or any of them.

In addition to those admissions, Mr. Spens, for the plaintiffs, at the Bar made two further admissions. The first was that the transfers were placed before the transferees respectively in the form in which they now are. The second was that there was no agreement between the transferors respectively and their respective transferees other than that, if any, which appears on the face of the respective transfers and from the oral request by the respective transferors to the transferees to accept the shares to which the respective transfers relate, and the oral agreement A by the respective transferees so to do.

Evidence was called by the defendants, the evidence being that of some of the persons to whom the shares had been transferred. Altogether the defendants called 6 transferees, a Mrs. Simpson, her husband Mr. Simpson, Mrs. Williams, her husband Mr. Williams, Mrs. Kelleher, and B her son William Patrick Kelleher. After those 6 witnesses had given evidence, Mr. Spens admitted that the evidence of all the other transferees, if called, would be substantially the same as that given by the 6 transferees whom the defendants had put into the witness-box. The substance of the evidence of the 6 witnesses who were called was that C there was no antecedent agreement between them and any of the transferors that the transfers were placed before them by an agent for the transferors, and that, without any agreement at all, they signed them, handing them back to the agent.

Upon those facts, the first question is: What is the proper duty D chargeable upon each of these 44 transfers? Is it the duty which has been paid in respect of them, namely, 1*s.*, or is it dependent upon the provisions of the Stamp Act, 1891, as amended by the Finance (1909-10) Act, 1910? Sect. 1 of the Stamp Act, 1891, charges the duty specified in Sched. I of the Act, and in Sched. I of the Act there are three E headings, each dealing with conveyances or transfers. The first is as follows:

> Conveyance or transfer, whether on sale or otherwise—(1) of any stock of the Bank of England (2) of any stock of the Government of Canada inscribed in books kept in the United Kingdom, or of any Colonial stock to which the Colonial Stock Act, 1877, applies.

F

Then in respect of those transfers the rate of duty to be charged is stated. That heading has no application to the present case. The next one is:

> Conveyance or transfer on sale—of any property (except such stock as aforesaid) where the amount or value of the consideration for the sale does not exceed £5.

G Then the rate of duty is stated, and there follows a scale showing the duty increasing with the consideration. The duty now chargeable in respect of conveyance or transfer on sale is 1 per cent. The next heading is, "Conveyance or transfer by way of security on any property." That heading has no application to the present case. On a "conveyance or H transfer of any kind not hereinbefore described" the duty charged is 10*s.* It is material to consider sect. 17 of the Stamp Act, which is as follows:

> If any person whose office it is to enrol, register, or enter in or upon any rolls, books, or records any instrument chargeable with duty, enrols, registers, or enters any such instrument not being duly stamped, he shall incur a fine of £10.

The next material relevant provision is to be found in the Finance (1909-10) Act, 1910, s. 74 (1), which is as follows:

> Any conveyance or transfer operating as a voluntary disposition *inter vivos* shall be chargeable with the like stamp duty as if it were a conveyance or transfer on sale, with the substitution in each case of the value of the property conveyed or transferred for the amount or value of the consideration for the sale.

Then sect. 74 (2) provides: A

> Notwithstanding anything in sect. 12 of the principal Act, the commissioners may be required to express their opinion under that section on any conveyance or transfer operating as a voluntary disposition *inter vivos*, and no such conveyance or transfer shall be deemed to be duly stamped unless the commissioners have expressed their opinion thereon in accordance with that section.

Those are the material provisions, I think, in the Stamp Act and in the B
Finance (1909-10) Act, 1910, and on them the question is whether, on the facts either as admitted or proved, these 44 transfers are properly stamped. It is plain, in my judgment, upon the admissions and the proof, that none of them was a conveyance on sale. It would be a perversion of fact to find, on the evidence and the admissions, that either C
the transferors intended to sell or any one of the transferees intended to buy the shares to which the transfers relate. That would be an impossible conclusion at which to arrive, on the evidence and on the admissions. Once that has been determined, the question is whether each transfer has to be stamped with a 10*s*. stamp under the last of the four headings D
"Conveyance or transfer" in the Stamp Act, 1891, Sched. I, or whether it has to be stamped as a voluntary disposition. If it is to be stamped under the heading, "Conveyance or transfer of any kind not herein before described", it is obviously insufficiently stamped, because the stamp duty chargeable is 10*s*. and the stamp duty paid is only 1*s*. If E
the duty is chargeable on the footing that each transfer is a voluntary disposition, it is equally plain that the transfers are not properly stamped, because of the provision in sect. 74 (2) that "no such conveyance or transfer shall be deemed to be duly stamped unless the commissioners have expressed their opinion thereon in accordance with that section," F
and they have not done so.

Having arrived at the conclusion that none of those instruments is properly stamped, what consequences follow? It has been decided by the Court of Appeal, in *Maynard* v. *Consolidated Kent Collieries Corporation* (1), that the directors are entitled to refuse to register a transfer of G
shares which is insufficiently stamped, and it was decided in that case that, in determining whether the transfer was duly stamped, they were entitled to go behind that which appeared on the face of the document, and, indeed, it seems to me impossible for any other conclusion to be reached. Then, if, having arrived, as I clearly have, at the conclusion H
that these instruments are improperly stamped, I were to go on to make an order upon the defendant company to register the transfers, I should be making an order which, if it were complied with, would result in some officer of the defendant company rendering himself liable to the penalty imposed by the Stamp Act, 1891, s. 17.

For these reasons, in my judgment, the action fails, and must be dismissed with costs.

Action dismissed with costs.

Solicitors: *William A. Crump & Son*, agents for *Gilbert Robertson & Co.*, Cardiff (for the plaintiffs); *Slaughter & May* (for the defendant company).

[*Reported by* J. MacGillivray Asher, Esq., *Barrister-at-Law.*]

Re MILL LANE LAND, EVERTON, *Re* LIVERPOOL EDUCATION (EMMANUEL SCHOOL PURCHASE) ORDER, 1929, *Ex parte* LIVERPOOL CORPORATION.

[Chancery Division (Clauson, J.), **October 28, 1937.**]

Education—Land acquired for educational purposes—Treasury grant—Compulsory purchase by local authority—Confirmation order—Whether consent to sale—Payment into court of purchase money—School Grants Act, 1855 (*c.* 131).

In 1872 a piece of land was conveyed to a vicar and churchwardens upon educational trusts, and, in accordance with the provisions of the School Grants Act, 1855, the conveyance was subject to a condition that no sale should be valid unless either the consent of the Home Secretary were given or the grant (a grant of £736 towards the purchase money had been made out of public funds) were repaid to the Treasury. In 1929 the Liverpool Corporation, after confirmation of the order by the Board of Education, acquired the land compulsorily, and an arbitrator assessed the compensation. The corporation paid to the vicar and churchwardens the compensation money less £736, the amount of the grant, which it paid into court. Upon an application by the Attorney-General for that sum to be paid out to the Treasury, it was contended that (*a*) the confirmation of the order by the Board of Education amounted to the consent to the sale required by the Act of 1855, (*b*) if there was no such consent, the sale was invalid:—

Held: (i) the confirmation by the Board of Education was not a consent to the sale, but a mere approval of the exercise of the power of compulsory purchase.

(ii) the sale was not invalid. The strict course would have been to pay the whole purchase money into court, but all that was essential was that the grant should be repaid, and that could be secured by an order for the payment out of the money to the Treasury in court.

[**EDITORIAL NOTE.** The matter discussed here is rather technical, but the case is of interest to all concerned with conveyancing or educational charities. The case sets out the proper procedure on a compulsory purchase of charity property, and also decides that a confirmation of a compulsory purchase order does not operate as a consent to a sale. Such a consent is very generally required in the case of sales of property belonging to a charity.

As to Grants of Land for Education, see HALSBURY, Hailsham Edn., Vol. 12, pp. 129-132, paras. 276-281; and for Cases, see DIGEST, Vol. 19, p. 597, Nos. 258, 259.]

Application by the Attorney-General for payment to the Treasury of a sum of money which had been paid into court in the following circumstances. In 1872 a school was built in Everton towards the cost of which the Treasury made a grant of £736 under the provisions of the

School Grants Act, 1855. The Liverpool Corporation, as the local educational authority, desired to acquire the school by compulsory purchase under the provisions of the Education Act, 1921, s. 111. They made an order accordingly and this was confirmed by the Board of Education. In Dec., 1929, the local authority served a notice to treat. The amount of the compensation payable was assessed by the arbitrator A
at £6,300, the award being made on the basis of reinstatement. This sum was paid to the owners of the school less the amount of the Treasury grant, which was paid into court.

A. Andrewes Uthwatt for the Attorney-General.

F. H. L. Errington for the Vicar and Churchwardens of Emmanuel B
Church, Liverpool.

C. Montgomery White for the Liverpool Corporation.

CLAUSON, J.: This is an application for payment out of court of a sum of between £800 and £900, which has been paid into court in C
circumstances which I will state.

It appears that in 1872 a piece of land was conveyed to the Vicar and churchwardens of Emmanuel, Everton, in the city and diocese of Liverpool, upon educational trusts. Shortly after that conveyance, a grant was made out of public funds, in accordance with the provisions of the D
School Grants Act, 1855, that grant being a sum of £736. In 1929, the Liverpool Corporation, as the local education authority, were minded to acquire this piece of land which was held by the vicar and churchwardens for charitable purposes, and accordingly they made an order for the compulsory acquisition of this piece of land, which order of itself was E
ineffective until it had been confirmed by the Board of Education. The Board of Education, under the Education Act, 1921, have a power to confirm such an order, and are bound to confirm such an order if, as happened in the present case, no objection is made to the granting of the order, unless the Board are of opinion that the land is unsuited for the F
purpose for which it is proposed to be acquired. There is no question but that the land was perfectly suited for the purpose, and, as far as I can see, the Board, in the circumstances, was bound to confirm the order. In other words, the right to take the land compulsorily was in the hands of the local education authority, the Liverpool Corporation, subject only G
to this, that the matter had to come before the Board, and the Board had this somewhat limited power of disallowing the compulsory taking. In due course, under the order so confirmed, an arbitration was held, and a sum was awarded, but a sum which, in accordance with the provisions of the order which had read into it the provisions of the Lands H
Clauses Act, was to be paid to the vicar and churchwardens, and it would have been perfectly open to the Liverpool Corporation to pay the whole of the purchase money into court and then to require the vicar and churchwardens to convey the land to them, or in default they could obtain the legal estate in the land under the provisions of the Act by

way of deed poll, the details of which I need not go into for the moment. As a matter of fact, a somewhat different course was taken. A reference to the School Grants Act, 1855, shows that, where a grant has been made, such as was made in this case, the statute provides that :

> A (1) . . . no sale, exchange, or mortgage of the premises in respect of which such grant hath been or may hereafter be made, in exercise of any power contained in the conveyance or other deed relating thereto, or under any other legal authority, shall be valid unless either the consent of the Secretary of State for the Home Department for the time being in writing under his hand be given to the same, or the amount of the grant which shall have been made as aforesaid shall be repaid to the Treasury.

B Accordingly, if the strict course had been taken, and the whole of the purchase money had found its way into court, the exact question which would have arisen would have been, to whom is the money to be paid out ; and, as it appears to me, under sect. 69 of the Lands Clauses Act there would have been no answer to an application by the Lords Com-
C missioners of the Treasury to ask that this money be applied, in the first place, to the discharge of a debt to them affecting the land in respect of which the money had been paid in, the debt being the grant, because it seems perfectly clear that, on the occasion of any disposition of this land by the vicar and churchwardens, whether under the power in the deed
D or under some power vested in them under the Lands Clauses Act, what is to happen is that, in the absence of consent by the Secretary of State for the Home Department, the amount of the grant is to be repaid to the Treasury. It appears to me, accordingly, that, if the whole purchase money had been paid in, the Treasury would be entitled to come forward
E and to ask for repayment to them of the amount of the grant. That having been done, there would have been no answer that I can imagine to the application of the vicar and churchwardens for payment out of the balance of the money, subject, possibly, to the fact that, as the land had been held under charitable trusts, there would have to be fulfilled
F certain preliminary conditions with which it is not necessary for me to deal. As a matter of fact, the parties took a course which really, in my view, short-circuited the strict procedure. The vicar and churchwardens were prepared to convey to the corporation on the footing that the corporation paid them the awarded purchase money less the figure of
G the Treasury grant, and paid the Treasury grant into court. I take it that that trifling deviation from the strict practice could not possibly affect the rights. The application before me is an application on behalf of the Treasury for payment out of that sum which has thus found its way into court, which represents the amount of the grant made in 1872.
H I ought to mention that, under a statute to which it has not been thought necessary to draw my attention, the power of consent given by the Act to the Lords Commissioners of the Treasury now appears to be vested in the Board of Education.

The first point made is this. It is suggested that the Board of Education consented to the sale within the meaning of the School Grants

Act, 1855, and that, accordingly, the Treasury have lost the right to have the grant repaid to them. What, it is suggested, is a consent of the Board of Education to the sale is the fact that, in the circumstances I have stated, they confirmed the order which made it possible for the local authority to take the land compulsorily. I cannot conceive that I can treat that as being a consent by the Board of Education to the sale. It is not a consent to the sale, it is an approval of the local authority having compulsory power to buy, which is a different point. It appears to me that there is nothing in it.

Then it is also suggested that in some shape or form the wrong course has been taken, that the net result of what has happened—the consent of the Board of Education, as I hold, having been given to the vicar and churchwardens' sale—is merely that the sale is invalid. I do not take that view. I take the view, having regard to the form of the Lands Clauses Act, that the sale is perfectly valid, but that the rights to the purchase money are not that the vicar and churchwardens are entitled to the whole, but that the purchase money must be dealt with in such a way as to respect the right in the Lords Commissioners of the Treasury to insist on the amount of the grant being repaid, which leads to exactly the same result as if what I should have thought was the strict course had been taken, namely, that of bringing the whole purchase money into court. It is not worth considering how one arrives at it, but it is quite plain, in the circumstances, that this grant must be repaid, and the sum paid into court was placed there for the purpose of repaying it. I order the money paid into court to be paid out to the Lords Commissioners of the Treasury, and the costs must be paid by the Liverpool Corporation.

Order that the money paid into court be paid out to the Lords Commissioners of the Treasury. Costs to be paid by the Liverpool Corporation.

Solicitors: *Treasury Solicitor* (for the applicant); *Preston, Lane-Claypon & O'Kelly*, agents for *Gamon, Arden & Co.*, Liverpool (for the Vicar and Churchwardens of Emmanuel Church, Liverpool); *F. Venn & Co.*, agents for *W. H. Baines*, Town Clerk, Liverpool (for the Liverpool Corporation).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

LIND *v.* JOHNSON.

[King's Bench Division (Goddard, J.), **October 22, 25, 29, 1937.**]

Master and Servant—Workmen's compensation—Alternative remedy—Action against third party—Workman in receipt of full wages—Receipts signed for compensation but no compensation actually paid—Whether action A *barred—Workmen's Compensation Act,* 1925 (*c.* 84), *s.* 30.

The plaintiff, a farm bailiff, was injured in a collision between his employer's van, which he was driving, and a motor lorry owned by the defendant. The defendant admitted the negligence of his driver, but relied upon the Workmen's Compensation Act, 1925, s. 30, alleging that the plaintiff had received compensation under that Act, and was debarred B from recovering damages. The plaintiff, was, in fact, paid full wages all the time he was off work, and made no claim for compensation. Some time after his return to work, however, he signed the usual form of receipt in respect of each week he was off work, the receipt stating that he had received compensation at the rate of 30*s.* per week. The employer in fact never received from the insurance company any sum in respect of the compensation, and the plaintiff received only his full C wages as stated above:—

Held: the plaintiff had received wages only, and not compensation, and no question arose under sect. 30. The plaintiff was entitled to recover in this action.

[**EDITORIAL NOTE.** The question here is whether the facts amount in law to a receipt of workmen's compensation. The payments made are, however, held to D be referable to wages only, with the result that the workman, having at no time received compensation, was not debarred by sect. 30 of the Act from bringing a common law action for damages.

As to Bar to Double Remedy, see HALSBURY, 1st Edn., Vol. 20, Master and Servant, pp. 195, 196, paras. 430, 431; and for Cases, see DIGEST, Vol. 34, pp. 490-496, Nos. 4063-4093. See, also, WILLIS'S WORKMEN'S COMPENSATION, E 30th Edn., pp. 464-470.]

Cases referred to:

(1) *Cuckson* v. *Stones* (1858), 1 E. & E. 248; 34 Digest 71, *483*; 28 L.J.Q.B. 25; 32 L.T.O.S. 242.

(2) *Elliott* v. *Liggens*, [1902] 2 K.B. 84; 34 Digest 490, *4063*; 71 L.J.K.B. 483; F 87 L.T. 29; 4 W.C.C. 11.

(3) *Warburton* v. *Co-operative Wholesale Society, Ltd.*, [1917] 1 K.B. 663; 12 Digest 378, *3122*; 86 L.J.K.B. 529; 116 L.T. 107; 10 B.W.C.C. 93.

(4) *Storey* v. *Fulham Steel Works Co.* (1907), 24 T.L.R. 89; 12 Digest 377, *3121*.

(5) *Niblett* v. *Midland Ry. Co.* (1907), 96 L.T. 462; 34 Digest 86, *639*.

(6) *Aldin* v. *Stewart*, [1916] S.C. 13; 34 Digest 495, case *l*.

G (7) *Reid* v. *Stevenson*, [1928] S.C. (Ct. of Sess.) 799; Digest Supp.

(8) *Huckle* v. *London County Council* (1910), 27 T.L.R. 112; 34 Digest 495, *4090*; 4 B.W.C.C. 113.

(9) *Oliver* v. *Nautilus Steam Shipping Co.*, [1903] 2 K.B. 639; 34 Digest 495, *4087*; 72 L.J.K.B. 857; 89 L.T. 318; 5 B.W.C.C. 65.

H Action for damages for personal injuries, in which the defendant pleaded that the action was barred by the receipt of compensation under the Workmen's Compensation Act. The defendant relied upon the Workmen's Compensation Act, 1925, s. 30.

Montague Berryman for the plaintiff.

Cyril Salmon for the defendant.

Salmon: It is clear that part of the sum paid to the plaintiff was compensation under the Workmen's Compensation Act. Unless this was so, the employer would not have made a claim against his insurance company for the compensation to which his employee was entitled. It is not necessary to satisfy the court that the plaintiff made an election between his remedy at common law, and a claim under the Act. The receipt signed by the plaintiff is conclusive. He relied upon *Oliver* v. *Nautilus Steam Shipping Co.* (9).

Berryman was not called on.

GODDARD, J.: The plaintiff in this action, who is a farm bailiff employed by Sir Fowell Buxton at Waltham Abbey, was driving a motor van, on Christmas Eve, 1935, to Chingford. A lorry belonging to the defendant came into collision with the plaintiff's van, and he was severely injured. He was taken home, but soon afterwards was seen by a consulting physician, who ordered his removal to hospital, where he stayed till about the middle of the following January. He was then sent away for convalescence, and was away from work for some 13 weeks. He returned to work late in March or early in April, 1936, but is still not wholly recovered, and still suffers pain as a result of the pleurisy which followed on the accident. He is by no means the man he was, and, though some improvement may still be looked for, it is a case in which, if he is entitled to damages, a substantial sum should be awarded.

He sues the owner of the van, and negligence is admitted, but the defendant relies on the Workmen's Compensation Act, 1925, s. 30, alleging that the plaintiff has received compensation under that Act, and is, therefore, debarred from claiming damages from him.

Now, the facts relating to this issue I find to be that his employer first heard of the accident on Dec. 29. His informant was Mr. Gunn, an assistant to Messrs. Strutt & Parker, who are Sir Fowell Buxton's agents, and Mr. Gunn in fact is the person who attends to the affairs of this estate. The plaintiff had been for many years in Sir Fowell Buxton's employment, and was a valued servant. Directly his employer heard of the accident, he instructed Mr. Gunn to continue his wages at the full amount during the time he was off work. No idea of terminating the contract of service entered his mind. Accordingly, Mr. Gunn paid the wages, £3 10*s.* a week, to the plaintiff's daughter while he was in hospital, and to the plaintiff when he was discharged. The plaintiff made no application to his employer for workmen's compensation, and no question of paying him anything except his full wages ever arose between him and Sir Fowell. The plaintiff said it never occurred to him that he could claim compensation, as he had not been injured on the farm, but had been hurt by the negligence of a third person. While, of course, this was a wrong view, it is quite intelligible that he should have held it.

When the plaintiff came out of hospital, Sir Fowell and Mr. Gunn called on him, and the latter suggested that he should instruct solicitors on Lind's behalf to claim damages. The plaintiff gratefully accepted this offer, and, accordingly, Mr. Gunn placed the matter in solicitors' hands, and a letter claiming damages was written on Jan. 27, 1936,
A by the solicitors instructed. Meanwhile, Mr. Gunn remembered that Sir Fowell was insured against claims under the Workmen's Compensation Act, and accordingly gave notice to the insurance company, who sent a form to be filled in relating to the case. This was sent to the insurance company, and the following day Mr. Gunn wrote them a
B letter in which, after referring to some medical expenses which had been incurred, he added :

> As this claim arises in connection with a motor car accident, we feel that some extra payment is due to Mr. Lind in connection with it and if your company cannot see their way to assist, would you take it up with the insurance co. of the owner of the lorry which caused the accident, with a view to obtaining redress from them.

C

On the same day, the insurance company wrote to Sir Fowell :

> *Re* Claim under Workmen's Compensation Policy [giving the number]. Injured employee J. Lind. Kindly pay the insured party compensation at the rate of £1 10*s.* per week whilst he is totally incapacitated from work, or until further notice, and obtain his signature on the enclosed form, week by week, as a receipt for same. Should such incapacity extend beyond 4 weeks, the matter must be referred to the
> D society again. It would be of great assistance if the employer would then state, if possible, the condition of the injured person, and the date of his probable return to work. It is essential, in the interests of the employer and of the society, that the employer should satisfy himself, from his own knowledge and by medical evidence, that the injured party is unfit for work on account of his accident. When the claim is at an end, the weekly payment form should be signed by the injured party at the foot, and returned to the society and the amount due will then be
> E remitted. It may be mentioned that neither the Workmen's Compensation Acts nor the policy makes any provision for the payment of medical or incidental expenses.

Sir Fowell gave the form to Mr. Gunn, who kept it. That is the form of receipt. After a few more letters, to which I need not refer, the insurance company wrote this letter to Messrs. Strutt & Parker on Jan. 21 :

> F We are obliged to you for your letter of the 18th instant as a result of which we are now able better to understand the circumstances of the accident. We should like to explain that at law Lind has the advantage of two sources from which to claim a recompense. The first is upon his employer under the Workmen's Compensation Act. In this event the compensation is limited to 30*s.* per week during total disability and as soon as the man is fit to undertake light work, the amount is adjusted according to the wages he can earn until it finally ceases upon his being certified by the doctor as fit for his pre-accident duties. The other we might say,
> G the more advantageous course is for the man to claim at common law against the owners of the other vehicle concerned in the accident. If he can settle his claim on the grounds of negligence against the other side then he is in a position to claim reimbursement on the full amount of wages he may lose as a result of his incapacity in addition to which he is justified in claiming for such incidentals as medical expenses, damages to clothes, etc., and also sufficient recompense for the pain and suffering caused him as a result of the accident. If he decide to claim at common
> H law, his procedure is to communicate immediately with the owners of the lorry who will no doubt pass the letter on to their insurance company for them to deal with, and as you will appreciate, if the workman agrees to follow this course, then it would be to his advantage to place his claim in the hands of a qualified solicitor.

Then the interview, to which I have already referred, took place, when Mr. Gunn offered to instruct solicitors on plaintiff's behalf to claim against the defendant.

None of these matters relating to the insurance company was known to the plaintiff. All he knew was that he was being paid his wages exactly as before the accident, and that a claim for damages was to be preferred on his behalf. Workmen's compensation was never discussed between him and his employer, and I am quite satisfied that it never entered into the plaintiff's mind to claim it, nor did Sir Fowell Buxton think he was paying anything but wages. Mr. Gunn, however, thought that, as his principal was paying an injured workman his full wages, he was entitled to get back some portion under his policy, and Sir Fowell must have thought so too. The plaintiff is not, however, concerned with any matters of insurance, or any question between his employer and the latter's insurers. The plaintiff was getting his full wages, believing, as was the fact, that a generous-minded employer was not going to discharge him, or to allow him to suffer financially, for an accident which was no fault of either, and was content to await the outcome of the proceedings which had been threatened on his behalf. But in April, when the plaintiff had returned to work, Mr. Gunn handed him the form of receipt which had been sent by the insurance company, and asked him to fill it in and sign it. The first entry of £1 10*s*. had been filled in by the insurance company with the appropriate date, and the plaintiff filled in the form for the remaining weeks and signed for each week.

The form is in these terms:

> Received by me J. Lind from Sir F. Buxton the undernoted sums, being compensation at the rate of £1 10*s*. per week, in terms of the Workmen's Compensation Act, 1925, under which I elect to take compensation in respect of injuries arising from an accident which occurred to me while in the course of my employment with the said Sir F. Buxton on or about Dec. 24, 1935.

There is then a space for each week, and against each week the plaintiff signs. The form concludes:

> If returned to work, please state on what date. [That is left blank.] If not returned, how is he progressing, and when do you consider he will be fit to return ? Still under doctor's care. If not returned, do you consider he could carry out suitable light work ? Difficult to say.

That was filled in by Mr. Gunn.

It is only right to say that neither Mr. Gunn nor Sir Fowell was aware of what I may call, I hope without disrespect, the trap that is contained in sect. 30, for there can be no doubt that the effect of the section sometimes works great hardship on an injured workman, who may, in a time of stress, accept a payment of half wages without realising that, in so doing, he is debarring himself from seeking damages. Before dealing further with the signing of the receipt, I will conclude the history by saying that, though the receipt was sent to the insurance company, nothing in fact has been received from them by Sir Fowell Buxton, and that they sent another form of receipt, which was never used or filled in—I should suppose because the plaintiff was back at work.

I have no doubt that the plaintiff read the receipt which was left with him, and indeed he does not dispute that he did; but he says—and

I accept his evidence on this point—that he gave it no consideration, nor do I think he understood why he was asked to sign it. His explanation was that, if he was told by the agent to sign a paper, he would do so without question, and, in the present instance, his mind had never been directed to the question of workmen's compensation, which he had never claimed, and which had never been mentioned. Of course, it is quite possible for an employer to say to an injured workman: "I will not only pay you compensation but I will also pay you an amount in addition to that which the law requires, so that you shall be no worse off during your illness." But that was not what happened here. In truth, the statement at the head of the form that the amount was received in terms of the Workmen's Compensation Act was not the fact. He had received nothing except his wages. No doubt the case would have been much stronger for the defendant had Lind acknowledged and signed for these payments week by week, but he did not. He signed the receipt some considerable time after he was back at work, and, if it be the fact that what he was paid was wages, his signature to an incorrect statement cannot turn the wages into compensation. Compensation seems to me to be the anthithesis of wages: a man receives the former because he cannot earn the latter. The position of a workman who is temporarily disabled, and his right to wages during disablement, have been the subject of judicial decision. Temporary disability does not of itself terminate the contract, nor disentitle the servant to wages, though, if the servant cannot work, the master can rescind the contract and dismiss the servant: *Cuckson* v. *Stones* (1). If the master does not dismiss the servant, but allows him to return when the disability ceases, the servant, as is shown by that case, can recover his wages. On the other hand, if he accepts compensation, he cannot at the same time recover wages: *Elliott* v. *Liggens* (2); *Warburton* v. *Co-operative Wholesale Society, Ltd.* (3), in which case SCRUTTON, L.J., said, at p. 668:

> Under decided cases a servant incapacitated by illness and in the absence of notice under the contract does not cease to be employed unless the illness is such as seriously to interfere with or frustrate the business purpose of the contract: *Cuckson* v. *Stones* (1); *Storey* v. *Fulham Steel Works Co.* (4). But, though still in employment, he is not entitled to full or any wages while receiving sick pay under rules, or compensation under the statute: *Niblett* v. *Midland Ry. Co.* (5); *Elliott* v. *Liggens* (2). The reason for this latter proposition is based either on an implied contract that a man who is receiving money because he is not able to work should not also claim the full money he would receive were he able to work, or, as in *Elliott* v. *Liggens* (2), on some kind of estoppel, which I do not clearly understand. The result of the cases, however, appears to be very good sense, and I do not think the court should interfere with them.

Here, as I have said, the plaintiff remained in Sir Fowell's service, the latter had no thought of dismissing him, and he was, accordingly, actually entitled to his wages. He has in no sense, either by action, by demand, or by acceptance of money, recovered compensation under the Act within the terms of sect. 30. It is, therefore, unnecessary for me to deal specifically with the cases in the Court of Sessions of *Aldin* v. *Stewart* (6) and *Reid* v. *Stevenson* (7), on which Mr. Salmon relied, or to consider whether these cases are in conflict with the decision of the Court of Appeal in England of *Huckle* v. *London County Council* (8). I do not think that the cases really conflict at all, but the facts in the Scottish cases are quite different from those with which I am dealing. There was no question there of the workmen having been paid wages: they were paid the statutory amount of compensation, and nothing else. A

Accordingly, I hold that the plaintiff is entitled to maintain his action, and I give judgment for him in the sum of £350, in addition to his special damages; that is, £442 15*s.* in all. I should add that Mr. Berryman—quite rightly, in my opinion—concedes that he is not entitled to sustain the claim for 13 weeks' wages which was at one time put forward. If B the defendants pay the plaintiff's special damage, I think that they should have a stay with regard to the £350, and I propose to grant them a stay for 10 days, and, if the amount is paid into court within that time, and notice of appeal given, stay till the hearing of the appeal.

Judgment for the plaintiff for £442 15s. C

Solicitors: *Ellis & Fairbairn* (for the plaintiff); *Blount, Petre & Co.* (for the defendant).

[*Reported by* C. St. J. Nicholson, Esq., *Barrister-at-Law.*]

D

MOUNT ALBERT BOROUGH COUNCIL *v.* AUSTRALASIAN TEMPERANCE AND GENERAL MUTUAL LIFE ASSURANCE SOCIETY, LTD.

[Privy Council (Lord Atkin, Lord Macmillan, Lord Wright, Lord Maugham), **July 22, 23, 26, 27, October 18, 1937.**] E

Privy Council—New Zealand—Conflict of laws—Interest on debentures issued in New Zealand by borough council and secured on a rate thereof—Whether interest thereon reduced by effect of Financial Emergency Act, 1931 (*No.* 3961 *of Victoria*), *s.* 19 (1)—*Distinction between obligation and performance of the obligation.* F

The appellants, a body corporate constituted under the Municipal Corporations Act, 1933, and the local authority of a suburban borough in the city of Auckland, are a local body within the meaning of the Local Bodies Loans Act, 1933. The respondents brought the action to recover £446 17*s.* 6*d.*, as being the balance short paid with respect to interest to the respondents, as holders of debentures for £130,000 issued by the appellants to the respondents, who at all material times were the G bearers of them. The agreement for the loan, after reciting that the appellants were by law authorised to borrow various sums of money totalling in all £750,000 for specified local improvements, provided that the respondents should pay to the appellants the monies agreed to be lent at the respective dates specified at a bank in Auckland, and that in return the appellants should hand over to the respondents the H debentures and interest coupons in the form agreed. The loan was secured on a special rate of 3*d.* in the £ on the rateable value of all rateable property in the borough of Mt. Albert. The respondents paid to the appellants the monies agreed to be lent, and the appropriate number of debentures and interest coupons was duly delivered by the appellants to the respondents. The appellants contended that, as the interest was payable to the respondents at Melbourne, the payment was governed by the Financial Emergency Act, 1931, of Victoria, and Acts amending that Act, which provided for reduction in interest payments :—

HELD : the *lex situs* applied to the security in New Zealand but not to the actual coupon, whether or not the personal obligation to pay was properly regarded as a specialty debt. The obligation to pay was not governed by the law of the place where payment was stipulated to be made in the sense that the amount of the debt, as expressed in the instrument creating it, could be varied by the Victorian legislation so as to bind any court outside the State of Victoria. The interest was, therefore, payable in full.

Decision of the Court of Appeal of New Zealand ([1936] N.Z.L.R. 54) *affirmed.*

[**EDITORIAL NOTE.** There is a general presumption against a legislature exceeding its legitimate jurisdiction. The authority vested by the Victorian Constitution in the legislature of Victoria is to legislate for the peace, order and good government of Victoria. Its statutes have, therefore, no extra-territorial force and cannot change the amount of a debt secured on New Zealand land or any land outside Victoria. In the present case New Zealand statutes defined and sanctioned the obligation to pay both the principal debt and the interest, and New Zealand courts were bound to give effect to the New Zealand statutes and not to those statutes as varied by the legislature of another state.

AS TO INTEREST PAYMENTS AND CONFLICT OF LAWS, see HALSBURY, Hailsham Edn., Vol. 6, pp. 277, 278, para. 332 ; and FOR CASES, see DIGEST, Vol. 11, pp. 407, 408, Nos. 760-772.]

Cases referred to :

(1) *R.* v. *Inglewood (Mayor, etc.)*, [1931] N.Z.L.R. 177.

(2) *Payne* v. *Esdaile* (1888), 13 App. Cas. 613 ; 42 Digest 624, *254* ; 58 L.J. Ch. 299 ; 59 L.T. 568.

(3) *Adelaide Electric Supply Co., Ltd.* v. *Prudential Assurance Co., Ltd.*, [1934] A.C. 122 ; Digest Supp. ; 103 L.J. Ch. 85 ; 150 L.T. 281.

(4) *Jacobs* v. *Crédit Lyonnais* (1884), 12 Q.B.D. 589 ; 11 Digest 396, *688* ; 53 L.J.Q.B. 156 ; 50 L.T. 194.

(5) *Auckland City Council* v. *Alliance Assurance Co., Ltd.*, [1937] A.C. 587 ; [1937] 1 All E.R. 645 ; Digest Supp. ; 106 L.J.P.C. 40 ; 156 L.T. 367.

(6) *Barcelo* v. *Electrolytic Zinc Co. of Australasia, Ltd.* (1932), 48 C.L.R. 391.

(7) *Wanganui-Rangitikei Electric Power Board* v. *Australian Mutual Provident Society* (1934), 50 C.L.R. 581.

(8) *Gibbs & Sons* v. *Société Industrielle et Commerciale des Métaux* (1890), 25 Q.B.D. 399 ; 11 Digest 388, *642* ; 59 L.J.Q.B. 510 ; 63 L.T. 503.

(9) *Hamlyn & Co.* v. *Talisker Distillery*, [1894] A.C. 202 ; 11 Digest 389, *643* ; 71 L.T. 1.

(10) *Ellis* v. *M'Henry* (1871), L.R. 6 C.P. 228 ; 11 Digest 407, *757* ; 40 L.J.C.P. 109 ; 23 L.T. 861.

(11) *British South Africa Co.* v. *De Beers Consolidated Mines, Ltd.*, [1910] 2 Ch. 502 ; 11 Digest 351, *361* ; 80 L.J.Ch. 65 ; 103 L.T. 4 ; *revsd.* on other grounds, [1912] A.C. 52.

(12) *Valery* v. *Scott* (1876), 13 Sc.L.R. 622 ; 11 Digest 392, case *p.*

(13) *Benaim & Co.* v. *Debono*, [1924] A.C. 514 ; Digest Supp. ; 93 L.J.P.C. 133 ; 131 L.T. 1.

(14) *Karori Borough* v. *Buxton*, [1918] N.Z.L.R. 730.

(15) *Broken Hill Proprietary Co., Ltd.* v. *Latham*, [1933] Ch. 373 ; Digest Supp. ; 102 L.J. Ch. 163 ; 148 L.T. 412.

(16) *Chatenay* v. *Brazilian Submarine Telegraph Co.*, [1891] 1 Q.B. 79 ; 17 Digest 331, *1424* ; 60 L.J.Q.B. 295 ; 63 L.T. 739.

(17) *Rouquette* v. *Overmann* (1875), L.R. 10 Q.B. 525 ; 6 Digest 243, *1556* ; 44 L.J.Q.B. 221 ; 33 L.T. 420.

(18) *Taylor* v. *Hollard*, [1902] 1 K.B. 676 ; 11 Digest 407, *759* ; 71 L.J.K.B. 278 ; 86 L.T. 228.

(19) *Winans* v. *R.*, [1908] 1 K.B. 1022 ; *affd.*, [1910] A.C. 27 ; 21 Digest 5, *1* ; 79 L.J.K.B. 156 ; 101 L.T. 754.

(20) *Royal Trust Co.* v. *A.-G. for Alberta*, [1930] A.C. 144 ; Digest Supp.

(21) *New York Life Insurance Co.* v. *Public Trustee*, [1924] 2 Ch. 101 ; Digest Supp. ; 93 L.J. Ch. 449 ; 131 L.T. 438.

(22) *Swiss Bank Corpn.* v. *Boehmische Industrial Bank*, [1923] 1 K.B. 673 ; Digest Supp. ; 92 L.J.K.B. 600 ; 128 L.T. 809.

(23) *R.* v. *International Trustee for the Protection of Bondholders Aktiengesellschaft*, [1937] A.C. 500 ; [1937] 2 All E.R. 164 ; Digest Supp. ; 106 L.J.K.B. 236 ; 156 L.T. 352.

(24) *Spurrier* v. *La Cloche*, [1902] A.C. 446 ; 11 Digest 389, *644* ; 71 L.J.P.C. 101 ; 86 L.T. 631.

(25) *Ralli Brothers* v. *Compañia Naviera Sota y Aznar*, [1920] 2 K.B. 287 ; 11 Digest 397, *699* ; 89 L.J.K.B. 999 ; 123 L.T. 375.

Appeal from a judgment of the Supreme Court of New Zealand [Sir Michael Myers, C.J., Reed, Smith, Johnston, and Fair, JJ.], dated Mar. 11, 1936, in an action instituted in the Supreme Court of New Zealand and removed into the Court of Appeal for argument and determination of questions of law.

John O'Shea, for the appellant corporation : The debentures issued by the appellant to the respondent, which have superseded the agreement to lend dated Sept. 4, 1926, come within the definition of " mortgage " in the Financial Emergency Act, 1931, of Victoria. The place of payment and surrender of coupon and debenture, provided under each of them, was at Melbourne in the State of Victoria, and, therefore, the law of Victoria, being the *lex loci solutionis*, governs all questions relating to performance of the contract, the whole of which is to take place in the State of Victoria. No legislature prescribing relief such as that given by the Victorian statute should by implication be held to have confined the operation of the Act to its own nationals. [Counsel referred to : *R.* v. *Inglewood* (*Mayor, etc.*) (1), *Wanganui-Rangitikei Electric Power Board* v. *Australian Mutual Provident Society* (7), *Gibbs & Sons* v. *Société Industrielle et Commerciale des Métaux* (8), *Hamlyn & Co.* v. *Talisker Distillery* (9), *Ellis* v. *M'Henry* (10), *British South Africa Co.* v. *De Beers Consolidated Mines, Ltd.* (11), *Jacobs* v. *Crédit Lyonnais* (4), *Adelaide Electric Supply Co., Ltd.* v. *Prudential Assurance Co., Ltd.* (3), *Valery* v. *Scott* (12), *Benaim & Co.* v. *Debono* (13), *Barcelo* v. *Electrolytic Zinc Co. of Australasia, Ltd.* (6), *Karori Borough* v. *Buxton* (14), *Broken Hill Proprietary Co., Ltd.* v. *Latham* (15), *Chatenay* v. *Brazilian Submarine Telegraph Co.* (16), *Rouquette* v. *Overmann* (17), *Taylor* v. *Hollard* (18), *Winans* v. *R.* (19), *Royal Trust Co.* v. *A.-G. for Alberta* (20), *New York Life Insurance Co.* v. *Public Trustee* (21), *Swiss Bank Corporation* v. *Boehmische Industrial Bank* (22), *R.* v. *International Trustee for the Protection of Bondholders Aktiengesellschaft* (23), *Auckland City Council* v. *Alliance Assurance Co., Ltd.* (5).]

Cyril Radcliffe, K.C., and *B. M. Cloutman* for the respondent company: The appellants were bound to pay the respondent the full sum of £5 13*s*. 9*d*. per cent. contracted for upon each and all of the debentures issued. The proper law of the contract is the law of New Zealand. The rate of interest payable under the debentures is a substantive condition of A the contract, and is accordingly governed by the proper law of the contract. Victorian law, the law of the place of performance, is incorporated by the proper law of the contract only to regulate the method of performance, and not to alter the substance of the obligations of the contract. The Supreme Court of New Zealand ought not to give B effect to a statute of Victoria if and in so far as such statute purports to alter or discharge an obligation created and governed by the law of New Zealand. In any event, on the true construction of the Financial Emergency Act, 1931, of Victoria, it has no application to these debentures. [Counsel referred to *Jacobs* v. *Crédit Lyonnais* (4), *Spurrier* v. *La* C *Cloche* (24), *Hamlyn & Co.* v. *Talisker Distillery* (9), *Benaim & Co.* v. *Debono* (13), *Ralli Bros.* v. *Compañia Naviera Sota y Aznar* (25), *Wanganui-Rangitikei Electric Power Board* v. *Australian Mutual Provident Society* (7).]

O'Shea, in reply.

D The judgment of their Lordships was delivered by LORD WRIGHT.

LORD WRIGHT: This appeal raises a question under that branch of the common law conveniently, though perhaps not quite accurately, described as the conflict of laws. The question is whether the obligation E to pay in Melbourne the interest on debentures issued in New Zealand by the appellants is affected by a statute of the State of Victoria reducing the rate of interest. The respondents are a life insurance company, incorporated in Victoria and carrying on business in Australia and New Zealand. The appellants are a body corporate constituted under the F Municipal Corporations Act, 1933, and control a borough in the suburbs of the city of Auckland. They are a local body within the meaning of the Local Bodies Loans Act, 1926, which repealed and replaced the Local Bodies Loans Act, 1913, and earlier Acts. The action was brought by the respondents to recover £446 17*s*. 6*d*., as being the balance short G paid with respect to interest to the respondents, as holders of debentures for a total sum of £130,000 issued by the appellants in the circumstances later set out. The respondents claimed that the interest due on Mar. 1, 1935, was £3,696 17*s*. 6*d*., but the appellants paid £3,250, and claimed that this sum was sufficient to satisfy the respondents' rights, on the H ground that, as the interest was payable to the respondents at Melbourne, the payment was governed by the Financial Emergency Act, 1931, of Victoria, and by the amending Acts, which provided for reductions in interest payments. The question is whether the Act applies to the appellants' obligation.

As the question was purely a question of law, MYERS, C.J., ordered that the following questions of law should be argued and determined in the Court of Appeal of New Zealand, namely :

(i) Whether the Victorian statutes mentioned in para. 11 of the statement of defence and counterclaim had any application to the debentures for £130,000 issued to the plaintiff by the defendant.

(ii) Whether the interest payable under the said debentures was reduced by the said provisions of the said Victorian statutes as provided in the Financial Emergency Act, 1931 (No. 3961 Victoria), s. 19 as from Oct. 1, 1931.

(iii) Whether if the said statutes applied the defendant was entitled to a refund of excess payments of interest made since Oct. 1, 1931, in ignorance of the effect of the said statutes, on the ground of mistake.

The Court of Appeal, after taking time to consider the case, unanimously answered questions (i) and (ii) in the negative. Accordingly, question (iii) did not arise.

For purposes of convenience, a specimen debenture No. 1 and interest coupon No. 18 were placed before the court. The debenture was in the following form :

DEBENTURE
No. 1 £1,000.
MOUNT ALBERT BOROUGH COUNCIL
of the borough of Mount Albert, Auckland, New Zealand.
1926 ROADING LOAN OF £537,500,

secured on a special rate of 3*d.* in the £ on the rateable value of all rateable property in the borough of Mount Albert (with provisions for a sinking fund of 1 per cent. per annum).

DEBENTURE FOR £1,000 payable at the Bank of New Zealand, Melbourne, Victoria, on Mar. 1, 1963.

Issued by the Mount Albert Borough Council, of the borough of Mount Albert, Auckland, New Zealand, under the Local Bodies' Loans Act, 1913.

N.B.—The holder of this debenture has no claim in respect thereof upon the government or public revenues of New Zealand.

ON PRESENTATION OF THIS DEBENTURE at the Bank of New Zealand, Melbourne, on or after Mar. 1, 1963, the bearer thereof will be entitled to receive £1,000 (one thousand pounds sterling).

Interest on this debenture will cease after the day when the payment falls due, unless default is made in payment.

THIS DEBENTURE bears interest at the rate of £5 13*s.* 9*d.* per cent. per annum, payable on Mar. 1 and Sept. 1 in each year, on presentation of the attached coupons at the Bank of New Zealand, Melbourne.

ISSUED under the common seal of the corporation of the borough of Mount Albert, Aug. 31, 1926.

(Signed) LEONARD E. RHODES, Mayor.
(SEAL). (Signed) H. UTTING, Treasurer.

The interest coupon was in the following form :

COUPON No. 18. DEBENTURE No. 1.
1926 ROADING LOAN OF £537,500.
OF THE MOUNT ALBERT BOROUGH COUNCIL, OF THE BOROUGH OF MOUNT ALBERT, AUCKLAND, NEW ZEALAND.

Issued under the Local Bodies Loans Act, 1913, secured on a special rate of 3*d.* in the £ on the rateable value of all rateable property within the borough of Mount Albert.

ON PRESENTATION of this coupon at the Bank of New Zealand, Melbourne, Victoria, on or after Sept. 1, 1935, the bearer hereof will be entitled to receive £28 8*s.* 9*d.*

Leonard E. Rhodes, Mayor.
H. Utting, Treasurer.

The debentures and interest coupons were issued to the respondents, who at all material times were the bearers of them, in pursuance of an agreement dated Sept. 4, 1926, made between the appellants as borrowers and the respondents as lenders. The agreement was executed under the common seal of the appellants in Mount Albert. A carbon copy was executed by the respondents in Melbourne. The agreement recited that the appellants had taken all necessary steps and had complete A authority of law to borrow by way of special loans under the Local Bodies Loans Act, 1913, various sums of money totalling in all £750,000 for specified local improvements, such as road, drainage and other like purposes, secured by special recurring rates to be made and levied upon the rateable value of all rateable property within the borough of Mount B Albert. The agreement provided that the respondents should pay to the appellants the monies agreed to be lent at the respective dates specified at a bank in Auckland, and that in return the appellants should hand over to the respondents the debentures and interest coupons in the form agreed. This was in fact done, and the appropriate number C of debentures and interest coupons, specimens of which are set out above, was duly delivered by the appellants to the respondents.

As the debentures and coupons were in terms issued under the Local Bodies Loans Act, 1913, it is necessary to refer to the material provisions of that Act, which deals generally with the special loans of local bodies D in New Zealand. It will be referred to as the Loans Act. The Loans Act, 1926, now in force, has been used in the argument of this appeal, the sections relevant to this case being identical, save in respect of numbering in some cases, with the corresponding sections of the Loans Act, 1913.

E The Loans Act requires that certain preliminary steps for the obtaining of the consent of the ratepayers should be taken. These conditions the appellants, as a local body acting under the Loans Act, had duly fulfilled. The other provisions which seem to be here material relate to the raising of the loan by the issue of debentures, which are to be F in the form prescribed by the Act. That statutory form was complied with in the debentures now being considered. Debentures and coupons were to be transferable by delivery and payable to bearer, as were those in question. As security for a loan, the local body was empowered to pledge, *inter alia*, a special rate made and levied for the purposes of the G special loan. In the present case, as appears on the face of the debenture, the loan was secured on a special rate of 3*d.* in the £ on the rateable value of all rateable property in the borough of Mount Albert (with provisions for a sinking fund of 1 per cent. per annum). This sinking fund, which was duly created, was in accordance with the Loans Act, H which provided that the sum of money named in any debenture and in any coupon should on maturity be a debt due to the holder by the local authority payable at the place, within or out of New Zealand, named in the debenture, and that, for the purposes of such repayment, a sinking fund might be created by the appropriation and pledging of part of the local fund. The provisions of the Loans Act dealing with a case of default in paying the sums secured are important. They enable the Supreme Court of New Zealand on petition to appoint a receiver of such part of the local fund or other property of the local authority charged for payment of the debenture or coupon; on the appointment of a receiver, all such property is to vest in him, and he is to have powers of sale of such property. A

It is clear that the charge on the rates is a charge on land in New Zealand: *R.* v. *Mayor of Inglewood* (1), at p. 202, citing *Payne* v. *Esdaile* (2), at p. 626.

It is now necessary to advert to the Victorian statute, which is relied on by the appellants as reducing the rate of interest payable under the B debentures. That statute is the Financial Emergency Act, 1931, No. 3961, as amended by the Financial Emergency Act, 1932, No. 4106. The recital to the Act of 1931 stated that it was desired to devise measures for meeting the grave financial emergency existing in Australia, and thereby averting disastrous consequences, and that a plan had been C devised for re-establishing the financial stability of the Commonwealth and States, and for restoring industrial and general prosperity, by means involving a common sacrifice, and including, among other things, certain reductions in the expenditure of the Commonwealth and State Governments and the conversion of the internal public debts of the Common- D wealth and States on the basis of a reduction of the interest payable. Part III of the Act dealt with, *inter alia*, "Reduction of interest on mortgages and other securities." Sect. 14 (1) defined the court for purposes of the Act as the Supreme Court (sc. of Victoria) or a judge or in certain cases a court of petty sessions. Mortgage was thus defined: E

> Mortgage means any deed, memorandum of mortgage, instrument or agreement whereby security for payment of money is granted (whether by virtue of such deed, memorandum, instrument or agreement or of any Act) over real or personal property or any interest therein; and without affecting the generality of this definition includes a mortgage given as security for money granted by a bank or corporation on overdraft; and also includes]
>
> (*a*) any debenture, inscribed stock or mortgage issued, created or given by any public or local authority. F

The words "public or local authority" are later defined as meaning any local authority within the meaning of the Public Contracts Act, 1928, and as including the State Electricity Commission of Victoria, the County Roads Board and similar bodies, and any municipality, G including the city of Melbourne and the city of Geelong.

Sect. 14 (1) (*b*) adds as coming within the word "mortgage":

> An agreement for sale and purchase of real or personal property under which interest is payable in respect of the whole or any portion of the purchase money.

H

It is not here necessary to quote the remaining definitions in the section. Sect. 19 (1) is the governing section for the purposes of this appeal. It is in the following terms:

> Except as hereinafter provided, every mortgage shall for a period of 3 years from the date of the coming into operation of this Division be construed and take effect as if it were a term of the mortgage that on and from the coming into operation

> of this part or (in case of a bank or pastoral company overdraft or in the case of a mortgage given to a society registered under the Building Societies Act, 1928) on and from the appointed day or the prescribed day (as the case may be) the interest payable under the mortgage should be reduced at a rate equivalent to 4*s.* 6*d.* for every pound of such interest.

The period was subsequently extended, and the provision was in force at the material date. Under the Act, interest was not to be reduced to a rate less than 5 per cent. per annum. It was also enacted that a mortgagee was entitled to apply to the court for an order excluding or modifying in certain events the operation of this section of the Act; if the application was made to petty sessions, it was to be made to the court of petty sessions held nearest to the location of the property the subject of the mortgage.

Sect. 28 (1) entitled a mortgagor to apply to the court where, under the mortgage, any interest accrued, due and payable was not in arrear or not more than six months' interest due and payable was in arrear for an order that the mortgagee should not, within a period of 12 months after the coming into operation of this part of the Act, exercise, in respect of the property comprised in the mortgage, any power of sale or foreclosure or other remedy for enforcing payment of the principal moneys thereby secured or interest, if any, in arrear at the time of such application.

Sect. 37 was as follows:

> Nothing in this part shall apply to any mortgage given as security for moneys raised by any public or local authority by way of loan outside Australia.

The above provisions of the Act have been set out in detail as bearing on the question which goes to the root of this appeal, which is whether the Financial Emergency Acts entitle the appellants to rely on them in the New Zealand courts in regard to the debentures and interest coupons. If they do not, then the defence based on sect. 19 (1) fails. Their Lordships agree with the unanimous judgment of the judges of the Court of Appeal that the Acts do not furnish a defence to the appellants, for various reasons. But it will be convenient, before developing these reasons, to deal with some general considerations.

The debentures and the interest coupons, in so far as they give a security on real property, namely, a portion of the local rate in New Zealand, are beyond question governed by the New Zealand law. The security can be enforced only in the courts of New Zealand and in the manner provided by the Loans Act. It is not disputed that these rights are governed by New Zealand law. But, in their Lordships' judgment, it is equally true that the personal obligation to pay is a New Zealand contract, governed by New Zealand law. It seems impossible to sever this personal covenant from the mortgage provisions which secure it. Indeed, the whole tenor of the transaction is consistent only with its being governed by New Zealand law. The loan was agreed in New Zealand, the money under the loan was paid by the respondents to the appellants there. The appellants were a statutory body in New Zealand which, in borrowing, were acting under the statutory powers contained in the Loans Act, as set out above. The respondents carried on business in New Zealand as well as in Australia. It is true that the place of repayment of the loan, and of payment of interest from time to time, was to be Melbourne, in Australia. But even that was fixed in accordance with the Loans Act, 1913, s. 32 (sect. 37 of the Act of 1926), which required payment of the debt to be at the place, within or out of A New Zealand, named in the debenture, so that the obligation to pay has statutory sanction. Mr. O'Shea in his able and exhaustive argument has contended that the payment is governed by Victorian law, because Victoria is the place of performance, and that Victorian law for this purpose includes sect. 19 (1) of the Financial Emergency Act. He B further contends that sect. 19 (1) applies to the debt because it is a specialty debt, and the coupon, which is the document of title, must necessarily be presented at the place of payment in Melbourne when payment is due and demanded, and thus at the relevant moment the *lex situs* applies so as to introduce the statutory reduction of interest. C Their Lordships are not prepared to accept either contention. While they think that the *lex situs* applies to the security in New Zealand, they do not think that the *lex situs* of the actual coupon can be applied to the instrument, whether or not the personal obligation to pay is properly regarded as a specialty debt. Nor can they accept the view D that the obligation to pay is here governed by the place where it is stipulated that payment is to be made, in the sense that the amount of the debt, as expressed in the instrument creating it, can lawfully be varied by the Victorian Financial Emergency Act so as to bind a foreign jurisdiction, or indeed at all. So to hold would be, in their Lordships' E judgment, to confuse two distinct conceptions, that is, to confuse the obligation with the performance of the obligation. It is well established in the law of England and of New Zealand, which in this respect follows it, that the proper law of a contract has to be first ascertained where a question of conflict of laws arises. F

The proper law of the contract means that law which the English or other court is to apply in determining the obligations under the contract. English law, in deciding these matters, has refused to treat as conclusive rigid or arbitrary criteria, such as *lex loci contractus* or *lex loci solutionis*, and has treated the matter as depending on the intention of the parties, G to be ascertained in each case on a consideration of the terms of the contract, the situation of the parties, and generally on all the surrounding facts. It may be that the parties have in terms in their agreement expressed what law they intend to govern, and in that case *prima facie* their intention will be effectuated by the court. But in most cases H they do not do so. The parties may not have thought of the matter at all. Then the court has to impute an intention, or to determine for the parties what is the proper law which, as just and reasonable persons, they ought to or would have intended if they had thought about the question when they made the contract. No doubt there are certain *prima facie* rules to which a court, in deciding on any particular contract, may turn for assistance, but they are not conclusive. In this branch of law, the particular rules can only be stated as *prima facie* presumptions. It is not necessary to cite authorities for these general principles. Sometimes their application involves difficulty, but not in this case. It has been already pointed out that there are, in their Lordships' opinion, such circumstances as lead to the inference that, in the present case, the proper law of the contract is the law of New Zealand, and, accordingly, that that law should *prima facie* govern the rights and obligations to be enforced under the contract by a court before which the matter comes, *a fortiori* a New Zealand court. It is true that, when stating this general rule, there are qualifications to be borne in mind, as, for instance, that the law of the place of performance will *prima facie* govern the incidents or mode of performance, that is, performance as contrasted with obligation. Thus, in the present case, it is not contested that the word " pound " in the debenture and coupon is to be construed with reference to the place of payment, and as referring to the " pound " in Victorian currency. Again, different considerations may arise in particular cases, as, for instance, where the stipulated performance is illegal by the law of the place of performance. But there is no question of illegality here, since the Victorian statute is not prohibitory. Mr. O'Shea relied on certain expressions used in *Adelaide Electric Supply Co., Ltd.* v. *Prudential Assurance Co., Ltd.* (3) as indicating that the House of Lords there laid down that the law of the place of performance applied for all purposes relating to performance, even to the extent of changing the substance of the obligation expressed or embodied in the contract, with the result in the present case that the amount of the interest was reduced by the effect of the Financial Emergency Acts. Their Lordships cannot accept this reading of the *Adelaide* case (3). The House of Lords was not concerned there with any such general questions, or with questions of the substance of the obligation, which in general is fixed by the proper law of the contract under which the obligation is created. The House of Lords was concerned only with performance of that obligation, in regard to the particular matter of the currency in which payment was to be made. There was no question such as a reduction in the amount of the debt or liability, or other change in the contractual obligation. The House of Lords had no intention of questioning the distinction, emphasised in *Jacobs* v. *Crédit Lyonnais* (4), between obligation and performance. Indeed, that line of authorities was not referred to, either in argument or in the speeches. It may be that in some cases difficulties have arisen in distinguishing " obligation " from " performance," and that " manner and mode of performance " may affect the value of the obligation. But the Victorian statute here is in express terms directed to " obligation," that is, to the construction and effect of the mortgage, and the reduction of the covenanted rate of interest. In *Auckland City Council* v. *Alliance Assurance Co., Ltd.* (5),

at p. 606, this Board has recently adverted to that distinction between obligation and performance. This way of considering the present case has been fully elucidated in the very careful judgments of the Court of Appeal. Their Lordships do not desire to be thought to express any dissent from these judgments, in so far as they hold that the Financial Emergency Acts do not operate to reduce the amount of the interest **A**
in this case, or proceed on the ground that to recognise the application of the Acts, as the appellants contend should be done, would not be to apply the law of the place of performance to the performance of the contract, but to apply it so as to change the substance of the obligation, because, according to the appellants' contention, the Acts would be **B**
applied to change the amount payable, which is a matter of obligation, and is not a mode or manner of performance. But their Lordships do not feel it necessary to pursue this aspect of the case at any greater length, or to give any final opinion upon it, because they think that the appeal can be determined on the single ground that, in their Lordships' judg- **C**
ment, which again agrees with that of the Court of Appeal, the Financial Emergency Acts do not apply to these debentures, or to the interest payable under them. This is the subject of questions No. 1 and No. 2 quoted above, which the Court of Appeal have answered in the negative, holding that the Victorian statutes have no application to the debentures **D**
or coupons. It is true that the debentures are mortgages in the sense in which the mere word mortgage is used in sect. 14 (1) of the Act of 1931, but they are not, in their Lordships' judgment, mortgages within the meaning of the Acts. To hold that the Act applied to the debentures would be to attribute to the Victorian legislature an intention to legislate **E**
in regard to matters lying outside its territorial jurisdiction, because the land charged under the debenture is in New Zealand. The authority vested by the Victorian Constitution in the legislature of the State of Victoria is to legislate for the peace, order and good government of Victoria. It is true that the principal monies and the interest are pay- **F**
able in Victoria, but they are payable under New Zealand contracts, and, furthermore, to change the amount of the debt would be to affect the security on the land, which is extra-territorial so far as Victoria is concerned. There are the further points that the extent of the security is defined by the debt, and that both the debt and the security are fixed **G**
by the New Zealand statute, so that to accede to the appellants' contention would be to treat a New Zealand Act as varied in regard to a New Zealand contract by Acts of the Victorian legislature.

Clear and precise words would be needed before there could be attributed to the Victoria legislature an intention to purport to exercise **H**
a jurisdiction of this character. But a careful consideration of the terms of the sections quoted above shows that, though the general definition of mortgage in sect. 14 (1) is wide enough to cover any mortgage of any land anywhere in the world, the intention of the Acts is to limit it to Victorian mortgages. This appears, *inter alia*, from the

definition of public or local authority, which could not apply to the appellants, because it is limited to such bodies in Victoria. The court as defined is a court in Victoria. If application is made to a court of petty sessions, it must be made to the court of petty sessions held nearest to the location of the property which is the subject of the mortgage. A Sect. 28 relates to applications to a Victorian court, which, again, if made to a court of petty sessions, must be to the court held nearest to the location of the property which is the subject of the mortgage. Sect. 37 is clearly limited to Victorian bodies. These and other indications show the territorial limitation of the enactments. It is not necessary to B rely on the recitals, which, however, seem to show that the purpose of the Acts had reference to internal debts in Victoria, and not to the relief of foreign debtors.

These particular considerations confirm the general presumption which always exists against a legislature exceeding its legitimate jurisdiction, C and seem to their Lordships to be sufficient, without more, to justify the decision of the Court of Appeal, that these Victorian statutes have no application to the debentures or to the interest. The debentures, though mortgages, are not mortgages to which the Acts apply. But the material question may be stated in even narrower terms as being D whether the court of New Zealand ought to give effect to these Victorian statutes. The matters concerned are mortgages of land (that is, the local rates which issue out of the land) situate in New Zealand. The charge is subject to New Zealand statutes, which also define and sanction the obligation to pay the debts, both principal and interest. The E machinery for enforcing the security is also provided for by the statute. No other court anywhere in the world has jurisdiction to enforce the security. The New Zealand courts are, *prima facie* at least, bound to give effect to the New Zealand statutes. Their Lordships cannot accept so anomalous a conclusion as that the New Zealand courts are required F to treat the Acts of the New Zealand legislature as varied by the legislature of another state. Their Lordships do not think that such a result was contemplated or intended by the Victorian legislature.

Two important cases decided in the High Court of Australia, having a bearing on the question just debated, have been cited to the Board. G These cases have not been argued before their Lordships, but referred to by way of illustration, and their Lordships do not express any final judgment upon them. All their Lordships desire to say here is that they do not conflict with what is said in the present judgment. In each case the appeal was from the courts of the state which had enacted the H legislation. The earlier was *Barcelo* v. *Electrolytic Zinc Co. of Australasia, Ltd.* (6). The questions arose under the same Victorian statute as is material in this appeal, the Financial Emergency Act, 1931. The High Court was called upon to decide whether sect. 19 (1) applied to the debentures of the respondent company. The debentures were secured by a trust deed, executed and kept at Melbourne, which created a fixed charge over real property in Tasmania and a floating charge over the rest of the company's property in other places. Interest was payable in Melbourne or London. But the essential circumstances on which the High Court, or at least the majority of the court, acted in holding that the law of Victoria governed the transaction, so that sect. 19 (1) applied to these debentures, was that it was a term of the trust deed that "these A presents shall be construed according to the law of the State of Victoria," and the debentures charged the property in terms of the trust deed. This provision was held (at least by the majority of the court) to bring within the scope of the Act the debentures, which had a Victorian element. It was accordingly held that the interest was reduced under B the Act. The reasons given by the judges are not entirely uniform. RICH, J., was content to say that the Act applied because, the debentures being transactions which in a real and practical sense concerned Victoria, it was clear that the governing law of the obligation was, as it was expressly agreed to be, Victorian. STARKE, J., held that the scope of C the Acts extended to every mortgage of property in Victoria, and every mortgage given or to be performed in Victoria, and every mortgage of which the proper law of the contract was that of Victoria. DIXON and MCTIERNAN, JJ., found a sufficient reason in the circumstance that the governing law of the debentures was Victorian. EVATT, J., based his D decision on the term in the trust deed. He said, at p. 435:

> The parties themselves not the Victoria legislature "intended" their rights and liabilities to be ascertained and enforced by reference to the Victorian law of mortgages and for this purpose their agreement is meaningless unless it implies that the general law of Victoria is to be applied to the transaction without paying regard to the limited territorial application which is a characteristic and inevitable E feature of all Victorian laws.

It seems clear that none of the reasons which induced the High Court to arrive at their conclusion would apply to the attitude to be adopted by the New Zealand court in regard to the Victorian legislation, on the facts of the present appeal. F

The other case cited from the High Court of Australia was *Wanganui-Rangitikei Electric Power Board* v. *Australian Mutual Provident Society* (7). The borrowers in that case were a New Zealand corporation subject to the Loans Act, the lenders were another Australian insurance company. The debentures in question were secured on the local body's rate in New G Zealand. The question was whether the New South Wales Interest Reduction Act, 1931, applied to the interest payable in New South Wales upon the debentures. The action was brought in New South Wales. It was held by the majority of the High Court that the Act did not apply to reduce the interest. Of the majority, DIXON, J., held that under H the language of the Act it extended only to obligations arising under the law of New South Wales, and did not include an obligation which arose under and was governed by the law of New Zealand. EVATT, J., found the guiding clue in the Interpretation Act, 1897, s. 17, of New South Wales, which limited, unless the contrary intention should appear, the operation of New South Wales Acts to matters and things "in and of" New South Wales. McTiernan, J., expressed the same view. This authority seems on the whole to support the view that the debentures and interest in question in this appeal are outside the scope of the Victorian Act. There is no corresponding Interpretation Act in Victoria, but it seems that a similar legislative limitation should be deduced from the general principles of the Victorian Constitution.

On the whole case, their Lordships are of opinion that the New Zealand Court of Appeal was right in refusing to give effect, in the circumstances of the case, to the Financial Emergency Acts, and that the appeal should be dismissed with costs.

They will humbly so advise His Majesty.

Appeal dismissed with costs.

Solicitors: *Gamlen, Bowerman & Forward* (for the appellant corporation); *Hewitt, Woollacott & Chown* (for the respondent company).

[*Reported by* T. A. Dillon, Esq., *Barrister-at-Law.*]

CAREY *v.* OCEAN COAL COMPANY, LIMITED.
CAREY *v.* RICHARDS.
CAREY *v.* REES.

[King's Bench Division (Lord Hewart, L.C.J., Humphreys and du Parcq, JJ.), **October 25, 26, 1937.**]

Mines—Coal mine—Machinery—Exposed and dangerous parts—Not kept securely fenced—Coal Mines Act, 1911 (*c.* 50), *ss.* 55, 102.

The respondents, as owners of a mine, and the agent and manager thereof, were charged with unlawfully contravening the Coal Mines Act, 1911, s. 55, in that all exposed and dangerous parts of machinery used in or about the mine, to wit, the return end of a belt conveyor, were not kept securely fenced. The bottom portion of the belt was 4 ins. from the floor, and the distance between the top and bottom portion of the belt was 3 ft. The rollers of the belt conveyor were encased in a cab or cage, which purported to shield them in such a manner as to prevent their being an object of danger to those employed in and about the belt conveyor. At each side of the cab or cage was a D-shaped aperture, which would enable the human arm to be put through for the purpose of oiling the rollers, when necessary. In front of the rollers, and between the top and bottom parts of the belt, there was no fencing. On Oct. 19, 1936, at a time when the belt conveyor had stopped, a fitter employed in connection therewith got on to the bottom portion of the belt and commenced to crawl along it on his hands and knees towards the return end and towards the rollers, apparently attempting to discover the cause of the stoppage. The belt, which was driven by an engine, and controlled by an operator some 50 yds. away, commenced to move. A shout was heard, the belt was stopped, and the fitter was found dead, with his head and arm fast between the top rollers of the bottom set at the return end. The information was dismissed on the grounds that the fitter, when he met with the accident, was acting in a wrong and extraordinary manner, and that, if he wished to get at the rollers, he could and should have got at them through the D-shaped apertures, and that the machinery in question was undoubtedly dangerous, but was not exposed within the meaning of sect. 55 of the Act of 1911:—

HELD: (i) it was wrong to assume that no offence was committed because the workman could have got at the rollers in some other manner, because the Act of 1911 was designed to protect not only the careful workman, but also the person who, through carelessness or forgetfulness, got near to machinery.

(ii) the machinery was exposed as well as dangerous within the meaning of sect. 55 of the Act of 1911. A

[EDITORIAL NOTE. The Coal Mines Act, 1911, s. 55, imposes an absolute duty to fence all exposed and dangerous parts of the machinery used in a mine, and that is a duty, both in regard to the workmen whose normal duties are some distance from such machinery, and in regard to those who most frequently are about it and use it. It is no defence that there is a safe way of attending to the machinery, if the dangerous machinery is not properly fenced. B

AS TO FENCING MACHINERY IN MINES, see HALSBURY, Hailsham Edn., Vol. 22, p. 800, para. 1650; and FOR CASES, see DIGEST, Supp., Mines, Part XIV.

Cases referred to:

(1) *Wing* v. *Soar* (1926), Unreported. C

(2) *Todrick* v. *Halliday*, [1928] S.C. (J.) 61; Digest Supp.

(3) *Hindle* v. *Birtwistle*, [1897] 1 Q.B. 192; 24 Digest 909, *71*; 66 L.J.Q.B. 173; 76 L.T. 159.

APPEAL by way of case stated from a decision of the stipendiary magistrate and the justices for the county borough of Merthyr Tydfil. The facts and the arguments are referred to in the judgments. D

Valentine Holmes for the appellant.

D. P. Maxwell Fyfe, K.C., and *Helenus P. J. Milmo* for the respondents.

LORD HEWART, L.C.J.: This is a case stated by justices for the county borough of Merthyr Tydfil. The case arises out of an information preferred by the appellant, who is a divisional inspector of mines under the Coal Mines Act, 1911, against the respondents, who are colliery proprietors, for that they were guilty of an offence under the Coal Mines Act, 1911, in that they at a certain colliery between days which are named, they being the owners of a mine known as the Deep Navigation Colliery: E F

> unlawfully did contravene sect. 55 of the said Act, in that all exposed and dangerous parts of machinery used in or about the said mine, to wit, the return end of a belt conveyor of the Huwood type situate in that part of the said mine known as Tom Sam's District in the Four Feet seam was not kept securely fenced [contrary to the provisions of the statute]. G

That information was heard at the same time as two similar informations against the agent and manager respectively of the mine. In the result, the justices dismissed the information, and the question is whether they came to a correct determination and decision in point of law. H

The Coal Mines Act, 1911, s. 55, provides as follows:

> Every fly-wheel and all exposed and dangerous parts of the machinery used in or about the mine shall be kept securely fenced.

That section clearly shows that two kinds of machinery must be kept securely fenced, first of all, every fly-wheel, and, secondly, all exposed and dangerous parts of the machinery used in or about the mine. Here there was no question about any fly-wheel. What was said was that certain exposed and dangerous parts of the machinery in question were not kept securely fenced.

The case finds that, at the time referred to in the information, there
A was installed and used in and about the part of the mine referred to a mechanically-driven belt conveyor, the maximum speed of which, when in action, would not exceed 1⅓ miles per hour. The justices add that there was produced before them a model, showing the return end of the belt conveyor, and illustrating its working. The evidence, they say, was
B that the belt conveyor travelled in an anti-clockwise direction, carrying the coal on the bottom portion of the belt. The bottom portion of the belt was 4 ins. from the floor, and the distance between the top and bottom portion of the belt was 3 ft. The rollers of the belt conveyor were encased in a cab or cage, which purported to shield them in such a
C manner as to prevent their being an object of danger to those employed in or about the belt conveyor. At each side of the cab or cage was a D-shaped aperture which would enable the human arm to be put through for the purpose of oiling the rollers when necessary. In front of the rollers, and between the top and bottom parts of the belt, there
D was no fencing, and then the justices add on this part of the case, which purports to be a statement of the facts proved or admitted:

> We were of opinion that such fencing in this part of the belt conveyor was not required, inasmuch as all the requisite access to the rollers could be obtained through the apertures. The said apertures were 2 ft. 7 ins. deep by 12 ins. wide in the widest part, tapering downwards to a minimum width of 4 ins.

E
Then they come to the happening of the accident:

> On Oct. 19, 1936, at a time when the said belt conveyor had stopped, one, Titus Davies, a fitter employed in connection therewith, got on to the bottom portion of the said belt and commenced to crawl along it on his hands and knees towards the return end and towards the said rollers. The said Davies was apparently attempting to discover the cause of the stoppage. The belt, which was driven by
> F an engine, and controlled by an operator some 50 yds. away, commenced to move. A shout was heard, the belt was stopped, and the said Titus Davies was found dead, with his head and arm fast between the top rollers of the bottom set at the return end.

In that state of the evidence, the justices say that it was contended on behalf of the appellant that the return end of the belt conveyor was an
G exposed and dangerous part of the machinery, and was not securely fenced, and that the respondents were guilty of the offence charged. The justices, however, came to an opinion which they have expressed in these words:

> We were of the opinion that the said Titus Davies when he met with the said
> H accident was acting in a wrong and extraordinary manner and that if he wished to get at the rollers he could and should have got at them through the D-shaped apertures, that the machinery in question was undoubtedly dangerous, but was not, in our view, exposed within the meaning of the Act upon the evidence adduced before us. We accordingly dismissed the said information.

That is, to say the least of it, a remarkable expression of opinion. It consists manifestly of three parts: the justices were clearly of the opinion that the machinery which was referred to was dangerous, because they say: " We were of the opinion . . . that the machinery in question was undoubtedly dangerous," but they dismissed the information. Why? Apparently for two reasons, and perhaps in order of importance, as it seemed to them, in the order which they have observed in expressing their opinion. First, because Davies, A

> when he met with the accident was acting in a wrong and extraordinary manner, and if he wished to get at the rollers he could and should have got at them through the D-shaped apertures.

That seems to be the foundation of their finding. Secondly, they add that, in their opinion, the machinery in question, although dangerous, B was not exposed within the meaning of the Act. There is hardly a point there which has not been previously dealt with by this court, sometimes directly under the Coal Mines Act, 1911, s. 55, as in *Wing* v. *Soar* (1), and sometimes in a series of cases under the Factory and Workshop Act, 1901, s. 10. It is quite true that the Coal Mines Act, 1911, s. 55, is not C the Factory and Workshop Act, 1901, s. 10, but the provisions of the Coal Mines Act, 1911, are stronger than the provisions of the Factory and Workshop Act, 1901. In the unqualified language of the Coal Mines Act, 1911, s. 55, there are no such savings or exceptions as are to be found in the Factory and Workshop Act, 1901. It is therefore quite D idle to say that the information was dismissed because the workman was acting in a wrong and extraordinary manner, and because, if he wished, he could have got at the rollers otherwise.

It ought to be unnecessary to repeat that legislation of this kind is not designed for the protection of only those workmen who act in a E perfectly right and ordinary manner, observing every possible precaution. Workmen very often have to be protected against themselves, not, that is to say, against the results of their own deliberate mischief, but against the consequences of doing what they have to do in a way which either hurry or laziness, or some other consideration, may present to their F minds as being, at the moment, the most convenient way of doing it. The section therefore provides that, if a part of the machinery is exposed and is dangerous, it must be securely fenced. Stress was laid in the argument for the respondents upon the word " kept," and, with reference to that word, our attention was invited to the Scottish case of G *Todrick* v. *Halliday* (2). That case on the facts was removed from the facts of this case as the poles are asunder. There something, which was not ordinarily used, was used because of the extraordinary emergency in the workings of a general breakdown, and it was said that the particular part of the machinery which was not then fenced could hardly H be a part of the machinery to which this section was applicable, because it was inconceivable that a fence should be kept there, and that, for such an occasional and rare and unexpected event as a general breakdown, followed by the unusual user of that part of the machinery, it would be wrong to think that this section applied. I am far from expressing

approval of that statement myself. I treat it with respect, but, in any event, it is not in the least degree binding upon this court; and, in my opinion, so utterly different are the facts there that it throws no light upon the present case. There are, however, passages in the opening part, in the judgment of LORD ALNESS, which show how impossible is
A the position of the respondents in this case.

Next, it was said that this part of the machinery, although undoubtedly dangerous *per se*, was not exposed. A little amplification of the argument proceeded to develop the proposition that in this section "exposed" means exposed to persons in general, and that it is not enough, in order
B to invite the safeguards provided by the section, that the particular machinery is exposed to those employees who most frequently are about it and use it. I cannot conceive anything more futile than a statutory provision for the protection of the life and limb of workmen which should except from, and entirely leave out of, its protecting provisions the
C particular class of workmen most likely to come, and to come most frequently, near to or in contact with the machinery referred to. All are to be protected, but that those whose function it is to work near to the machinery are not to be protected seems to me to be a paradox of a high order, a kind of paradox which a man employs in defending
D a controversial position which is perceived to be unsustainable. There is no magic about the word "exposed," and I am not going to define it. The word speaks for itself. I find it a little difficult to understand how a part of the machinery can be at one and the same time dangerous but not exposed—unless the justices are drawing a distinction between
E what may be considered dangerous in the abstract, or universally, without reference to any particular person or time or place, and dangerous as regards some particular individual. The justices in this case have found that this part of the machinery was dangerous *vis-à-vis* Titus Davies, and they have found it was not exposed. If it was not exposed,
F how did Davies get his head and his arm into it? It is not suggested he put his head and arm into the rollers in a spirit of mischief. When the accident happened, he was moving along the belt. He was moving along it in the direction of the rollers, for the perfectly legitimate purpose of ascertaining, if he could, the cause of the momentary stoppage. But
G it is quite obvious that, if there had been a protecting shield between him and the rollers, his head and his arm could not have got into the rollers. I cannot understand how it can be said that that part of the machinery was not exposed. The argument really developed into this, that, although the machinery was exposed to a person in such a position
H as that into which Titus Davies got, it was not exposed to the person passing by its side in the colliery. I see no such limitation upon these words. "Exposed" is not limited in its effect. "Exposed" means "at all exposed" in the mine. If the machinery is dangerous, and if it is machinery which is being used in or about the mine, it must not be exposed. Above all, one would think it must not be exposed to the

persons whose work may take them into close contact with it. But it was said—I do not know whether it was said to the justices below, but it has been said with great emphasis here—that, even if the rollers in the places referred to had been securely fenced, nevertheless, for such a definite act as oiling or repairing or effectively tracing a stoppage, it might have been necessary to remove, for a moment, whatever fence A there was there. Our attention was directed to the Factory and Workshop Act, 1901, s. 10. It is quite true that, under the Factory and Workshop Act, 1901, s. 10, after the universal and unequivocal provision that all dangerous parts of machinery and every part of the mine gearing must either be securely fenced or be equally safe, fenced or unfenced, B it goes on to make an exceptional provision as to what may be done where proper fencing has been provided. The words are these, in sect. 10 (1) (*d*):

> All fencing must be constantly maintained in an efficient state while the parts required to be fenced are in motion or use, except where they are under repair C or under examination in connection with repair or are necessarily exposed for the purpose of cleaning or lubricating or for altering the gearing or arrangements of the parts of the machine.

But that is a beneficial exception relating to what may be done in those particular limited circumstances, where the fencing provided for by the Act has been duly carried out. There is no such provision in the Coal D Mines Act, 1911, and, even if there had been, it could never have been turned to the account of defendants who had omitted to do the fencing. How can any human being, more or less responsible for the life and limb of another human being, be heard to say: "It is quite true I did not provide a fence, but what does it matter? If I had provided a fence, E then, at a moment of oiling or repairing, the fence might have had to be removed." Such an argument is simply not open to persons who have failed in the primary statutory duty of providing secure fencing. I am very far from suggesting that, in order to oil particular machinery, or in order to oil this machinery, a fence, if provided, might have had F to be removed, and I am very far from suggesting that the ingenuity of mankind could not devise a secure fence which might permit oiling without removal of the fence, but those questions simply do not arise when the offenders, at the very threshold, are found to be in delinquency. They have provided no fence, and therefore I am not concerned to G consider the question of whether, if they had, the fence might not have had to be taken off. This court has often held that it is no answer at all, on the part of employers who have refrained from doing the requisite fencing, to say: "Well, but if we had provided it, the fencing might have had to be taken away for oiling." Mr. Maxwell Fyfe's argument H in this case, ingenious and exhaustive as it is, involves this result, if it is to prevail: it involves that in all kinds of ways this clear, concise and imperative section in this statute shall be re-written and embroidered with exceptions and provisoes. As it stands, so far as it relates to dangerous parts of machinery, it says that all exposed and dangerous parts of machinery used in and about the mine shall be kept securely fenced. If Mr. Maxwell Fyfe's very clever argument were to prevail, the section would have to be re-written in full in some such way as this: "All dangerous parts of machinery, if exposed to employees or workmen other than those most commonly near or in contact with them, but not otherwise, shall be kept, in the normal circumstances of the working, securely fenced in the interests of workmen who do nothing that they should not do and never behave in an extraordinary way." Then I think he would add a proviso: "Provided that no proceedings shall be taken under this section unless it appears that an inspector of mines has given notice in writing before the happening of the accident that the fencing which was not provided ought to have been provided." That might be very useful from the point of view of some colliery owners, but it would be death and destruction to this statute, which has been described more than once as the charter of the man who has to work underground. I cannot attempt to re-write the section.

Finally, we are told it is a question of fact whether the part of the machinery is exposed and dangerous. It is undoubtedly a question of fact, and a question of fact to be decided by reasonable minds upon the available evidence, and nowhere in this case is there a shred of evidence upon which any reasonable mind, in my opinion, could find that this machinery was not exposed. Mr. Maxwell Fyfe feels the pinch of it himself. He says: "True, it is exposed if a man is working in or near it, as this fitter was. 'Exposed' in this section does not mean that. It means exposed so as to be a danger to employees in general who were not called upon to work in or near it." In other words, the protection is to be most useful for those who do not want it, and of no use at all for those who want it most. In my opinion, the justices here have erred in point of law. They have, indeed, found, and found correctly, upon the evidence, that the machinery in question was undoubtedly dangerous, but they have directed their minds to something quite irrelevant when they dismiss the information upon the ground that the workman met with the accident when he was acting in a wrong and extraordinary manner, and might have done otherwise, and, in my opinion, they go further, and, when they find that this particular part of the machinery was not exposed, they come to a conclusion for which no support is offered by the evidence in the case. I think, therefore, that the answer to the question (and the only question asked is whether the justices came to a correct determination and decision in point of law) must manifestly be No.

There, in the ordinary way, would be the end of the case, but it is said here that the justices not only struck badly, but also struck too soon, and their too hasty intervention had the effect of preventing the respondents from developing defences which, if the opportunity had offered, they might have sought to develop. It is suggested, faintly, perhaps, but it is suggested, that, partly under sect. 75 and partly under sect. 102 (1) of the statute, there might conceivably be some defence or excuse open to one or both or all of these respondents. I cannot imagine what it can be, but that is neither here nor there. If we are told, and we must assume we are seriously told, that there is, or there may be, a desire on the part of some, or all, of the respondents to seek to put forward a statutory defence, and to establish it by means of evidence, it would be wrong to deny them that opportunity. Therefore, all I am saying for the moment is that, in my opinion, the conclusion at which the justices have arrived is untenable in point of law, and, if they desire to hear, or if the respondents desire that they should hear, further evidence by way of exculpation upon a defence which would utterly contradict all the argument laid before us in this case, I do not think it would be right to prevent them from having that opportunity. Subject to that, I think this appeal ought to be allowed with costs.

Humphreys, J.: Having heard the judgment of Lord Hewart, L.C.J., in this case, I desire to say only that I agree with every word of it.

du Parcq, J.: I am of the same opinion, and wish to add only a few words. In this case, the stipendiary and the other justices found, no doubt correctly, that this machine was dangerous. They had had cited to them *Hindle* v. *Birtwistle* (3) (cited by Lord Hewart, L.C.J., in the unreported case of *Wing* v. *Soar* (1)) where Wills, J., said, at p. 195:

> It seems to me that machinery or parts of machinery is and are dangerous if in the ordinary course of human affairs danger may be reasonably anticipated from the use of them without protection. . . . In considering whether machinery is dangerous, the contingency of carelessness on the part of the workman in charge of it, and the frequency with which that contingency is likely to arise, are matters that must be taken into consideration.

I assume that the justices approached the question as to whether this machinery was dangerous or not with those observations in their mind, and they found that it was. Thus, taking into account the possibility of carelessness on the part of the workman, they found that danger might be reasonably expected from its use. Danger to whom? Clearly danger to those whose duties might compel them to do some work upon it, much more than to any other persons in the mine. I agree respectfully that it seems most paradoxical to say that, when one looks at the word "exposed," one must treat it as meaning only exposed *quoad* people who have no concern with that particular machinery. In elaborating his argument, Mr. Maxwell Fyfe, if I understood him, said that, where one is concerned with a fitter whose duty it would be, for instance, to lubricate and repair machinery, the machinery was not exposed if it was exposed only so far as he was concerned in the ordinary course. I think it is instructive, having regard to that argument, to look perhaps a little more closely than the magistrates did at that unreported case of *Wing* v. *Soar* (1). In that case, the man who had been injured was employed as a fitter, and he was injured when he was oiling the shafting in question in that case. That shafting was placed 13 ft. 8 ins. above a boarded platform, which, in its turn, was 11 ft. above the level of the ground, and was approached by a ladder. It was when the man who was injured, and, indeed, I think, killed, was upon the ladder, doing his ordinary work of oiling, that his clothes were entangled in the shafting, and he sustained the injuries from which he died. In that case, the justices had found—wrongly as this court held—upon the facts, that the machinery was not dangerous. In his judgment in that case, my Lord said this:

> In this case it seems to me that there are two observations to be made. The first is that upon the facts stated it would be startling if any person could come to the conclusion that this shafting, placed where it was and oiled as it was, was anything other than exposed and dangerous. It is not even suggested that it was not exposed.

In this case, the justices appear to have realised that, if they were to follow the decision in *Wing* v. *Soar* (1), they could not find that this machinery was anything but dangerous; but they have taken a somewhat desperate refuge in the finding that, though dangerous, it was not exposed. The finding is wholly inconsistent, I do not say with the express decision in *Wing* v. *Soar* (1), but with what may be the dictum in *Wing* v. *Soar* (1). It seems to me that it so clearly follows, by any process of accurate reasoning, from the decision in *Wing* v. *Soar* (1) that the magistrates ought to have realised that, when once, in this case, they found that the machinery was dangerous, it was quite impossible to hold that it was anything but exposed. I agree with the order proposed by Lord Hewart, L.C.J.

Appeal allowed and case remitted to justices to hear any defence under sect. 102 *of the Act of* 1911.

Solicitors: *Solicitor to the Board of Trade* (for the appellant); *Furniss, Stephen & Co.*, agents for *A. J. Prosser*, Cardiff (for the respondents).

[*Reported by* Michael Marcus, Esq., *Barrister-at-Law.*]

LEVER BROTHERS, LTD. *v.* INLAND REVENUE COMMISSIONERS.

[King's Bench Division (Lawrence, J.), **October 13, 29, 1937**]

Revenue—Stamp duty—Transfer of shares—Acquisition of not less than 90 *per cent. of issued share capital—Part of* 90 *per cent. of issued share capital previously acquired for cash—Finance Act,* 1927 (c. 10), *s.* 55.

The appellant company in 1919 acquired all the issued ordinary shares of the C. Co. for a cash consideration. In 1936, it acquired practically all the issued preference shares, in consideration of the allotment of preference shares of the appellant company. It was contended that the transfers effecting the acquisition of the preference shares in 1936 were exempt from stamp duty under the Finance Act, 1927, s. 55 :—

HELD : the consideration for the acquisition of the ordinary shares was cash, and not the allotment of shares, and it could not be said that the appellant company had increased its capital with a view to the acquisition of 90 per cent. of the share capital of the C. Co. The transfers were not entitled to the exemption claimed, and attracted the usual *ad valorem* conveyance duty. A

[EDITORIAL NOTE. This case severely limits the operation of the exemption in the Finance Act, 1927, s. 55. The decision is apparently limited to the question of the earlier acquisition being for cash ; but the case lends some support to the view of the commissioners that there must be an acquisition at one and the same B time of not less than 90 per cent. of the shares in consideration only of the allotment of shares in the acquiring company, and the occasion must be a reconstruction or an amalgamation of companies.

AS TO RELIEF FROM STAMP DUTY ON TRANSFERS OF SHARES, see HALSBURY, Hailsham Edn., Vol. 5, pp. 809-813, paras. 1386, 1387; and FOR CASES, see DIGEST, Supp., Companies, Nos. 7155*a*, 7155*b*. For the section see HALSBURY'S C COMPLETE STATUTES OF ENGLAND, Vol. 16, pp. 983-986.

CASE STATED by the commissioners of inland revenue, pursuant to the Stamp Act, 1891, s. 13. Lever Bros., Ltd., the appellant company, has an authorised share capital of £130,000,000, of which £61,369,584 is issued, and £68,630,416 is unissued. Since Aug., 1919, the appellant D company has been the beneficial owner of all the issued ordinary shares of the New Transvaal Chemical Co., Ltd., which shares were acquired by allotment for cash. In 1936, the appellant company acquired 341,903 out of the 350,000 issued preference shares, all of £1 each fully paid, of the chemical company, and thus became the beneficial owner of not E less than 90 per cent. of the issued share capital of the chemical company. The appellant company, in respect of the preference shares acquired in 1936, allotted preference shares of the appellant company credited as fully paid to the then holders of such preference shares in the chemical company. The appellant company contended that the transfers by F which the preference shares in the chemical company were transferred to it were exempt from stamp duty under the Finance Act, 1927, s. 55. The inland revenue commissioners refused to allow the exemption, upon the following grounds : (*a*) since the ordinary shares had been held by the appellant company since 1919, the acquisition in 1936 was not an G acquisition of not less than 90 per cent. of the share capital of the chemical company ; (*b*) the ordinary share capital of the chemical company was not acquired in connection with a scheme of amalgamation or reconstruction ; (*c*) the requirements of the Finance Act, 1927, s. 55 (1) (B) (*b*), were not shown to be complied with ; (*d*) the consideration H of the acquisition of not less than 90 per cent. of the issued share capital of the chemical company was not the issue of shares in the appellant company to the holders of shares in the chemical company. The commissioners assessed the transfers to *ad valorem* conveyance duty of 10*s*. per £50 or part thereof.

Sir William Jowitt, K.C., and *James Wylie* for the appellant company.

The Attorney-General (*Sir Donald Somervell, K.C.*) and *J. H. Stamp* for the Commissioners of Inland Revenue.

Lawrence, J.: The question in this case is whether two instruments whereby the appellant company took transfers of certain shares in another company in consideration of the issue of the appellant company's shares are exempt from stamp duty by virtue of the Finance Act, 1927, s. 55. The question turns mainly upon the construction of sect. 55 (1) (*b*), (*c*), in the following circumstances. The appellant company had acquired for cash several years ago all the ordinary capital of the New Transvaal Chemical Co., Ltd., which amounted to 40 per cent. of its capital. By the instruments in question and other like instruments the appellant company acquired the Transvaal company's preference shares to the extent of over 50 per cent. of its total capital in consideration of the allotment to the holders thereof of unissued capital of the appellants.

In these circumstances, it is contended for the appellant company that it has increased its capital with a view to the acquisition of not less than 90 per cent. of the issued share capital of the Transvaal company, and that the consideration for the acquisition consisted as to 90 per cent. thereof in the issue of shares in the appellant company to the holders of the shares in the Transvaal company within the meaning of sect. 55 (1) (*b*), (*c*).

It is contended, on the other hand, for the Crown, and has been held by the commissioners, that the appellant company has not increased its capital with a view to the acquisition of not less than 90 per cent. of the issued share capital of the Transvaal company, because the appellant company increased its capital only with a view to acquiring 50 per cent. of the said share capital, and that the consideration for the acquisition was not in shares, but partly in cash, if regard is had to the original acquisition of 40 per cent. of the said share capital.

I am of opinion that the decision of the commissioners is correct.

It is no doubt true in one sense that the increase of capital was made with a view to the acquisition of not less than 90 per cent. of the said share capital, but the more natural sense of the words of the section is, in my view, that the increase of capital must be made with a view to the acquisition of not less than 90 per cent. of the said share capital in the sense that not less than 90 per cent. must be acquired by the increase of capital. A company does not, in my opinion, increase its capital with a view to the acquisition of 90 per cent. of share capital when it acquires 89 per cent. without any increase of its capital and 1 per cent. by such increase. I think that this construction is supported by subsect. (*c*). The acquisition there referred to must be the acquisition referred to in subsect. (*b*), and the acquisition referred to in subsect. (*b*) is the acquisition of not less than 90 per cent. The consideration for the acquisition of 40 per cent. in the present case was cash and not shares.

Appeal dismissed with costs. Declaration that the transfers are liable to ad valorem *duty as assessed by the commissioners.*

Solicitors: *J. M. B. Stubbs* (for the appellant company); *Solicitor of nland Revenue* (for the respondents). A

[*Reported by* W. J. Alderman, Esq., *Barrister-at-Law.*]

HILLS *v.* LONDON PASSENGER TRANSPORT BOARD. B

[Court of Appeal (Greer, Slesser, and Scott, L.JJ.), **October 12, 1937.**]

Practice—Application for security for costs—Non-payment of costs in court below—Insufficiency of affidavit—R.S.C., Ord. 58, *r.* 15.

In an application for security for the costs of an appeal, the respondents filed an affidavit alleging that, though application had been made to the appellant for payment of the costs in the court below, no such payment had been made:— C

Held: this was not sufficient grounds for making an order for security.

[**EDITORIAL NOTE.** It has been thought that the mere non-payment of costs in the court below was sufficient ground for ordering security, and this view appears to have been stated in the practice books. This case corrects that impression. D

As to Security for Costs, see HALSBURY, Hailsham Edn., Vol. 26, p. 119, para. 237; for Cases, see DIGEST, Practice, pp. 808-812, Nos. 3704-3748. See YEARLY SUPREME COURT PRACTICE, 1938, pp. 1292-1295.]

Motion by the respondents for security for costs. E

A. F. Engelbach for the respondents.

Greer, L.J.: It has for a long time been the practice in this court that, where a respondent desires to obtain security for the costs of an appeal, he must state in his affidavit facts which show the appellant's inability to pay such costs. It is not sufficient in a case of this sort merely to state that an application has been made to the appellant to pay the costs of the action in the court below, and that such costs have not been paid. It is quite possible that an appellant may be unwilling to pay such costs although he be well able to pay them. I think it ought generally to be known that the mere failure by an appellant to pay the costs of an action is not, in the absence of facts showing his inability to pay them, sufficient grounds for making an order for security. This application must be dismissed, but without prejudice to the respondents making a further application upon proper evidence. F G H

Slesser and Scott, L.JJ., concurred.

Application dismissed.

Solicitor: *R. McDonald* (for the respondents).

[*Reported by* E. Fuller Briscoe, Esq., *Barrister-at-Law.*]

R. *v.* SHOREDITCH COUNTY COURT REGISTRAR, *Ex parte* SAXON FINANCE CORPORATION, LTD.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Humphreys and du Parcq, JJ.), **October 29, 1937.**]

County Courts—Proper court for commencement of action—Action founded on a contract of sale of goods payment to be made by instalments—Contract of guarantee—District in which cause of action wholly or in part arose—County Court Rules, 1936, *Ord.* 2, *r.* 1.

A person, who resided in Shadwell, entered into a contract in writing for the purchase of a bicycle from the applicants, on the terms that a certain amount of money should be deposited, and the balance of the price should be paid by instalments, and that, in the event of default in payment of the instalments, the whole balance should become due. Arising out of the said contract, a contract of guarantee was entered into by the purchaser's father, whereby he agreed that, in the event of default in payment of the said instalments, he would pay the sum which thereby became due to the applicants in London. Default having been made, the applicants desired to sue the guarantor, not in the court for the district in which the defendant resided or carried on business, but under the provisions of the County Court Rules, 1936, Ord. 2, r. 1, which provides that an action may be commenced in the court for the district in which the cause of action wholly or in part arose, unless the action is founded on a contract for the sale or hire of goods and payment is to be made by instalments. The applicants contended that, as the proposed action against the guarantor arose out of a contract in writing by the guarantor providing for payment in London, the cause of action partly arose at the office of the applicants in London:—

HELD: as the action on the guarantee was in substance founded on a contract for the sale of goods where payment was to be made by instalments, it came within the exception to the above rule and should be commenced in the court for the district where the guarantor resided.

[**EDITORIAL NOTE.** The County Court Rules, Ord. 2, r. 1, restrict the choice of court in certain cases, one being where the contract is one for the sale of goods with a provision for payment by instalments. In the case of certain goods, it is very common for such contracts to contain a guarantee by a third party to pay the instalments if the purchaser should default. The decision here is that, when suing upon the guarantee, the plaintiff is bound by the restrictions imposed by the rule, as the guarantee is an integral part of the contract.

AS TO DISTRICT IN WHICH ACTION FOR SALE OF GOODS SHOULD BE COMMENCED, see HALSBURY, Hailsham Edn., Vol. 8, p. 192, para. 300; and FOR CASES, see DIGEST, Vol. 13, pp. 461-463, Nos. 115-131.]

APPLICATION to make absolute a rule *nisi* for an order calling upon the registrar of the Shoreditch county court and the defendant in a proposed action to show cause why the registrar should not cause a summons to issue out of the Shoreditch county court in a proposed action between the Saxon Finance Corpn., Ltd., and Samuel House upon a claim for balance due under a guarantee agreement. The facts and the arguments are set out in the judgments.

Douglas C. L. Potter in support of the rule.

Valentine Holmes and *Helenus P. J. Milmo* showed cause.

LORD HEWART, L.C.J.: In this case, there is an order calling upon the registrar of the Shoreditch county court and the defendant in a proposed action to show cause why the registrar should not cause a summons to issue out of the Shoreditch county court in a proposed action between the Saxon Finance Corpn., Ltd., and Samuel House upon a claim for balance due under a guarantee agreement. The grounds are set forth at great length. The matter really comes to this, as far as the facts are concerned, that there was a contract in writing made by a person called the customer, Harry House, with a company called the Saxon Cycle Engineering Co., Ltd., for the sale of a bicycle, on the terms that a certain amount of money should be deposited, and instalments of the purchase price should be paid, and that, if there was default in paying the instalments, the whole of the remaining payments should become due. In connection with, and arising out of, that contract, a guarantee was entered into by somebody else, who appears to have been the father of the customer, whereby the guarantor agreed that, in the case of default in paying any instalments of the price of the bicycle, the Saxon Magna model, he would pay the sum which became due to the Saxon Finance Corpn., Ltd., in London. In those circumstances, default having been made, and the guarantor having become *prima facie* liable, it was desired to sue, not in the court for the district in which the defendant resided or carried on business, but under the provisions of the County Court Rules, Ord. 2, r. 1. It is said, on the part of the person who obtained the rule, that the proposed action as against the guarantor arises out of a contract in writing which provided for payment in London, and that, accordingly, the cause of action partly arose at the office of the Saxon Finance Corpn., Ltd., in London. We have, therefore, to consider the meaning of the relevant portions of this important order in the County Court Rules, 1936. When one looks at the subject-matter, and remembers the kind of action which is being considered, it is manifestly important to remember that the place where an action may be commenced is a topic of great importance to the defendants, who are not likely to be persons of considerable means in such cases.

The County Court Rules, Ord. 2, r. 1, provides:

> (1) Except where by any Act or rule it is otherwise provided, an action may be commenced (*a*) in the court for the district in which the defendant or one of the defendants resides or carries on business . . .

There is a primary provision in the rule, which is that the plaintiff must go and look for the defendant, and he must bring the defendant to answer to him where the defendant himself may be. However, there is an alternative:

> or (*b*) subject to the succeeding paragraphs of this rule, in the court for the district in which the cause of action wholly or in part arose.

Subject to that limitation, the action may be commenced in the court for the district where part of the dispute arose. Now, what are the limitations? The rule is dealing with the topic of the commencement of actions generally, and para. (3) goes on to provide as follows:

> Where the action is founded on a contract for the sale or hire of goods and payment is to be made by instalments, para. (1) (*b*) of this rule [which enables the

> action to be commenced in the court for the district where part of the cause of action arose] shall not apply, unless (*a*) the claim is for a sum of money exceeding £20 [that is not this case]; or (*b*) the contract was made in the district of the court in which the plaintiff proposes to commence the action by the defendant or by someone (not being a servant or agent of the plaintiff) authorised to make the contract on the defendant's behalf, and the defendant or the person so authorised was present when the contract was made.

A In view of those provisions, the applicant for this order contended, and contends, that the contract referred to in the action which he proposed to bring is a contract of guarantee made in the district of the court which he has selected, that is to say, in the district of the Shoreditch county court.

B The question is, is it true to say that that is not the whole of the matter, and that the applicant for the order is really concerned with an action which is founded on a contract for the sale or hire of goods, and a contract where payment is to be made by instalments? As one looks at the guarantee, the contract for the sale of the bicycle by instalments C is written all over it. It is that which gives meaning to the guarantee. There is the reference number of this bicycle. It matters not whether it is the number of the bicycle or the number of the contract, because they are the same. The guarantee is expressed in this way:

> In consideration of you supplying (at my request) Mr. Harry House [the customer] D of 81, St. George Street, Shadwell, with Saxon Magna Model for a total of £9 6*s.* 9*d.* upon the terms of the above order, I agree that, should he make default in due payment of any instalment or instalments of the price thereof, as provided in such order, the whole sum shall immediately become due and, I will, on demand, pay same to you in London.

In order to see what it was that was guaranteed, one has to look at E the contract for the sale of goods in respect of which payment is to be made by instalments. In order to see how the guarantee should become operative, one has to find a default in payment under that contract. In order to see what is the extent of the guarantor's liability in terms of money, one has to look to the terms of that contract. It seems to F me to be quite plain that that contract (which is called the blue form) was a contract for the sale of goods where payment is to be made by instalments, and that the proceedings contemplated by the applicant for the present order were manifestly proceedings founded on that contract. Without it the substratum of his claim has gone. He has a guarantee G in the air, a guarantee which becomes unintelligible and inexplicable.

Mr. Potter, who has done everything he can in support of the rule, has referred to cases on the question of whether a particular action was founded on contract or founded on tort. Those are very interesting cases, but they do not seem to help the present controversy at all. The H would-be plaintiff desires to proceed on the contract. The question is whether the foundation of his claim is the contract for sale by instalments. In my opinion, it quite clearly is so. If that is not the foundation, then the whole foundation of his claim must be an unintelligible and inexplicable matter. It is not merely in order to substantiate his case before the court if the case came on, but he would be bound as a

matter of evidence to refer to the contract for the sale or hire of goods and the payment by instalments. That is the very foundation of the liability of the guarantor. It is there that this liability arises, and it is under that contract that the measure of his liability is to be ascertained. I think it is quite clear that the rule here has expressed the meaning which is contended for by Mr. Valentine Holmes, and that here A
was a contract; the foundation of the matter was the contract for the sale of goods, the payments to be made by instalments.

I therefore think that this order ought to be discharged.

HUMPHREYS, J.: I am of the same opinion. These proceedings B
raise a neat point, and the question which we have to decide is whether the registrar was wrong in the view which he took, in the circumstances of this case. The plaintiff was seeking to commence an action which, in truth, was founded on a contract for the sale of goods, payment to be made by instalments. I do not think that any person reading the C
language of Ord. 2 (1) (iii) would read it otherwise than in this way, that the foundation of the action—the substratum of the action, the *causa sine qua non* of the action—was a contract for the sale of goods, payment to be made by instalments. That seems to be the reasonable construction of the expression "founded on a contract" of a particular D
sort. But it is said that those words "founded on" must be construed, in this order, in the light of the expression, which is a well-known one, as it has been construed in questions which arise between an action founded on contract and an action founded on tort. I agree with LORD HEWART, L.C.J., with great respect, that those considerations do E
not apply to this case at all. We are dealing here with a question as to whether a particular action ought to come within certain exceptions which enable it to be brought in a place where otherwise it could not be brought. We have to give a reasonable construction to what I think are—and are intended to be—quite ordinary words. I should say, F
without hesitation, that, where an action is founded upon some document which is so much the basis of the action that the action cannot possibly proceed without production of that document and reliance on it, the action may be said to be founded, at least in part, on that document, which in this case is a contract for the sale of goods by instalments; G
and I think that the registrar was right. I agree with the result expressed by LORD HEWART, L.C.J.

DU PARCQ., J.: I have come to the same conclusion, and I also agree that we do not derive any assistance from the cases decided under H
what is now the County Courts Act, 1934, s. 47. Mr. Potter, in his concise and able argument, has invited us to do what the court ought never to do, that is to say, to see how words, used in quite a different context and for quite other purposes, have been construed by the courts, and then to try to force somewhat similar words, in quite a different

context, to bear the same meaning. Now, the question which arose under sect. 47 of the County Courts Acts was occasioned by the use by the legislature of language which I think it must be admitted was not very precise. Dealing with the question of costs to which the plaintiff should be entitled, the legislature divided all actions into actions
A founded on contract and actions founded on tort, and it is no doubt the fact that you may have an action in which the plaintiff is entitled to rely, and possibly is relying, both on contract and on tort. The courts have to deal with that difficulty, and to do what I think we must do here, look to see what was the purpose of the enactment, and what,
B therefore, must have been intended by the legislature. The effect of the decision there is, I think, this. It is clear that the legislature was saying that, if a man's claim is in substance one of tort, he is entitled to go to the High Court, and ought to get the costs to which he is entitled upon a High Court action, if his action was one where it might be neces-
C sary for him to prove a contract in order to maintain it, he would be entitled to costs because of the relationship of the parties. In other words, the court ought to know the substance of the matter, and to do that which it is plain, from the language used, the legislature must have intended. That is the principle which the court is applying here.
D When one looks at the whole of the rules of Ord. 2, so far as they are material, it is plain enough that the legislature does not intend the persons to be harrassed by actions being brought against them in a district remote from the place where they live, where the claim is a small one of a particular nature. The case provided for in terms by this rule is the
E case of an action founded on a contract for the sale or hire of goods, payment to be made by instalments, where the claim is a small one. Now, if one gives any reasonable construction to those words, remembering what is the sole purpose of the order, it appears to me that this action plainly comes within it. The particulars of the plaintiffs' claim
F themselves make that abundantly clear. The plaintiffs are suing on a guarantee in writing, but, when one looks closely at the words of the guarantee as they have been set out, it amounts to a promise that, if the plaintiffs will enter into a contract at the request of the defendant with Mr. Harry House, should Mr. Harry House not pay any instalments
G due under that contract, then the defendant will pay the sum which thereby becomes due under the contract made between Mr. House and the plaintiffs. That contract, to which reference is made, which itself is at the very root of the proceeding, and which forms part of the consideration of the defendant's contract, is a contract for the sale or hire
H of goods. I think, therefore, that this case is a reasonably plain case, and I agree that the order should be discharged.

Order discharged with costs.

Solicitors: *Vivash Robinson & Co.* (in support of the rule); *Treasury Solicitor* (showing cause).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

COLLINS (INSPECTOR OF TAXES) *v.* JOSEPH ADAMSON & CO. JOSEPH ADAMSON & CO. *v.* COLLINS (INSPECTOR OF TAXES).

[KING'S BENCH DIVISION (Lawrence, J.), **October 19, 20, 1937.]**

Income Tax—Deductions—Capital expenditure—Trade association—Expenditure for price maintenance—Expenditure to secure acquisition of business for its winding up—Expenditure to secure acquisition of business that it may become an active member of the association.

An association was formed for the purpose of maintaining prices of boilers, and as part of its operations it applied a part of its funds in one case to the purchase of (*a*) a business, which was thereupon wound up, (*b*) its plant, which was thereupon destroyed, and (*c*) a covenant preventing future competition, and, in a second case, for the acquisition of shares in a company, to obtain control thereof and to secure it as an active member of the association. These payments were apportioned among the members of the association, and they sought to have such allowed as deductions against income:—

HELD: the payments were properly attributable to capital. It is immaterial for this purpose whether or not the expenditure produces a tangible asset; it is sufficient that it creates an advantage of an enduring nature. In the first case, the payment has secured the removal of a trade competitor, and, in the second, the acquisition of a business, and both were capital assets, and the payments could not be allowed as a deduction against income.

[EDITORIAL NOTE. The commissioners in the present case had distinguished these payments, holding that, as the first had produced no tangible asset, it could not be attributable to capital, but that the second, having produced such an asset, was properly attributable to capital. The second holding is upheld, but the first is reversed, it being considered that an enduring advantage, though of an intangible nature, is a capital asset. It has been held that, if money is spent for the purposes of a trade, and the expenditure would, if successful, produce a capital asset, or an asset of an enduring nature, which is of a capital nature, it is equally a capital payment if the expenditure is unsuccessful, and it can be deduced therefrom that the question of whether the payment is properly a capital or a revenue payment cannot be tested by seeing whether the payment is productive. It is sufficient that it produces an enduring advantage, though that advantage may be of a negative nature.

AS TO CAPITAL EXPENDITUE, see HALSBURY, Hailsham Edn., Vol. 17, pp. 158-161, paras. 325-327; and FOR CASES, see DIGEST, Vol. 28, pp. 47-49, Nos. 237-252.]

Cases referred to:

(1) *British Insulated & Helsby Cables* v. *Atherton*, [1926] A.C. 205; 28 Digest 52, *264*; 95 L.J.K.B. 336; 134 L.T. 289; 10 Tax Cas. 155.

(2) *Mallett* v. *Staveley Coal & Iron Co., Ltd.*, [1928] 2 K.B. 405; Digest Supp.; 97 L.J.K.B. 475; 139 L.T. 241; 13 Tax Cas. 772.

(3) *Glenboig Union Fireclay Co., Ltd.* v. *Inland Revenue Commissioners*, [1922] S.C. (H.L.) 112; 12 Tax Cas. 427.

(4) *Anglo-Persian Oil Co., Ltd.* v. *Dale*, [1932] 1 K.B. 124; Digest Supp.; 100 L.J.K.B. 504; 145 L.T. 529; 16 Tax Cas. 253.

(5) *Van den Berghs, Ltd.* v. *Clark*, [1935] A.C. 431; Digest Supp.; 104 L.J.K.B. 345; 153 L.T. 171; 19 Tax Cas. 390.

(6) *Mitchell* v. *Noble (B. W.), Ltd.* [1927] 1 K.B. 719; Digest Supp.; 96 L.J.K.B. 484; 137 L.T. 33; 11 Tax Cas. 372.

(7) *Southwell* v. *Savill Brothers, Ltd.*, [1901] 2 K.B. 349; 28 Digest 57, *288*; 70 L.J.K.B. 815; 85 L.T. 167; 4 Tax Cas. 430.

Cases stated for the opinion of the court by the commissioners for the special purposes of the Income Tax Acts under the Income Tax Act, 1918, s. 149. The facts and arguments are fully set out in the judgment.

The Solicitor-General (*Sir Terence O'Connor, K.C.*) and *Reginald P. Hills* for the Inspector of Taxes.

Cyril L. King, K.C., and *John L. Addleshaw* for Joseph Adamson & Co.

Lawrence, J.: In these two cases, the question which arises is whether payments which have been made by Joseph Adamson and Co. to the Association of Shell Boiler Makers, of which they were members, were payments which are properly attributable to capital, or which can properly be charged against revenue.

There are two payments in question, one payment of £21, which Adamsons paid to the Association in connection with the agreement into which the Association entered, through its trustee, with Hewitt and Kellett, Ltd., and the other a sum of £32, which Adamsons paid to the Association as part of the grant of £5,500 to John Thompson (Wolverhampton), Ltd., in consideration of John Thompson (Wolverhampton), Ltd., acquiring 80 per cent. of the shares of Wilsons Boilermakers, Ltd. The commissioners have decided that, in the case of Hewitt and Kellett, the payment made by Adamsons was a revenue payment, because Adamsons did not thereby bring into existence any asset; but, in the case of the £32, they have held that the Association, in making the grant, did acquire an asset, and that, therefore, the £32 was an expenditure of capital, and must be disallowed.

It was agreed before me that no distinction ought to be drawn between Adamsons and the Association, and it has been admitted, as I understand it, before the commissioners and before me, that both of these sums, the £21 and the £32, were sums which were laid out exclusively for the purposes of Adamsons' trade.

The Association was an association for the purpose of keeping up prices, and, under its rules, a pool of profits was established, in which the members of the Association were to share. Hewitt and Kellett, Ltd., had been members of the Association, but they proposed to cease to be members, and to sell their business to another firm or company, who did not intend to be members of the Association. In those circumstances, the Association thought it desirable to acquire the business of Hewitt and Kellett, Ltd., and they did acquire the business through their nominee, by the agreement of Feb. 28, 1934, which is scheduled to the case, under which Hewitt and Kellett, Ltd., sold to the nominee the goodwill of Hewitt and Kellett, Ltd., and all trade-marks, patents, drawings, name, and other books and papers. Hewitt and Kellett, Ltd., and their shareholders covenanted with the nominee that they would close down the business and would wind up the company, and that the machinery should be scrapped, with the exception of portions which might be purchased by members of the Association. Mr. John Hewitt, who was the owner of the land on which the business of Hewitt and Kellett, Ltd., had been carried on, was to covenant not to use that land for the business of a boilermaker for 20 years. In consideration of the sale of the assets, and of Mr. John Hewitt's covenant, the Association A agreed to pay a sum of £3,500 for the assets, and £3,500 for the covenant by John Hewitt. £1,811 was the expenditure in the year which is under consideration in this case, and £21 is the proportion of Adamsons.

Attention was drawn in the argument to the fact that this consideration was stated to be for the assets set out in cl. 1 of the agreement, B which assets do not include the machinery, and the other £3,500 was the consideration for a covenant of Mr. John Hewitt, and there was no consideration attributed specifically in the agreement to destroying the machinery.

This agreement was carried out, and the machinery was destroyed C by Hewitt and Kellett, Ltd., in the presence of a representative of the Association. It is found that:

> no goodwill, trade-marks, patents, books or accounts of this business were ever in fact assigned or handed over.

D

The drawings were destroyed, and the plant was scrapped or sold to members. Those are the facts in the case of Hewitt and Kellett.

In the case of John Thompson (Wolverhampton), the Association considered that it was essential to the Association to get a company called Wilsons Boilermakers, Ltd., Glasgow, into the Association. They E agreed with John Thompson (Wolverhampton), Ltd., who were members of the Association, that the Association would grant to John Thompson (Wolverhampton), Ltd., a sum of £5,500 toward the cost of John Thompson acquiring 80 per cent. of the shares of Wilsons Boilermakers, Ltd. John Thompson (Wolverhampton), Ltd., accordingly acquired those F shares, and the £32 which has been paid by Adamsons is their share of the £5,500 for the year in question.

In these circumstances, Adamsons contend, through Mr. Cyril King, that neither of these payments was of a capital nature, that they are both truly revenue payments and ought to be charged against the G profits of the year, that they produced no asset to Adamsons or to the Association, and that any advantage which they may be thought to have produced was of such a problematical, impalpable, and intangible character that it cannot be regarded as being of a capital nature. The Solicitor-General, on the other hand, contended that the payments H were made for the purpose of acquiring capital assets, or enduring advantages of a capital nature, and that, on the authorities, they were properly attributable to capital, and not to revenue.

The cases to which my attention was drawn were, in the first place, *British Insulated & Helsby Cables* v. *Atherton* (1), and particularly to the much commented upon dictum of Viscount Cave, L.C., at p. 192, where he said :

> But when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital.

In that case, the House of Lords were dealing with a fund which had been created by the respondent company as a nucleus of a pension fund for its employees. The money had been handed over to trustees for the employees of the respondent company, and it had been contended, on behalf of the respondent company, that the payment of that money to trustees created in the hands of the respondent company no asset at all, and that, therefore, it could be charged to revenue ; but the House of Lords came to the conclusion, on the principle stated by Viscount Cave, L.C., that the company had by this payment of money created for itself an enduring benefit or advantage which was of a capital nature.

The next case that was referred to was *Mallett* v. *Staveley Coal & Iron Co., Ltd.* (2). That was a case where a payment had been made by a coal-mining company to alter the terms of one lease of coal measures, and also to get rid altogether of another lease of coal measures, which the company considered were onerous leases. It was held there that the payment for the surrender and alteration of these leases was an expenditure of capital, and not chargeable against profits. The fact that the company was there dealing with what were undoubtedly its capital assets was relied upon by Mr. King as a material distinction from the present case. On the other hand, the Solicitor-General relied upon the passage in the judgment of Rowlatt, J., at p. 778 :

> They have got nothing, says Mr. Latter, for this expenditure. Well, perhaps they have not, but there is this, that they have now got a list of leases of a field of mineral which has the advantage of being minus an undesirable part of it, instead of having one that is encumbered with an undesirable part of it. That is what they have got. It seems to me that the whole transaction, on the clearest possible principles, is a capital transaction.

Adopting that reasoning, the Solicitor-General contends that, just as that coal company had paid that sum of money for the purpose of getting rid of an undesirable lease, so the money was here paid for the purpose of getting rid of an undesirable competitor, and for the purpose of getting rid of the assets of this other company which were being used in competition with the members of the Association.

The next case was *Glenboig Union Fireclay Co., Ltd.* v. *Inland Revenue Commissioners* (3), where it was held that a sum of money which was received by a fireclay company from a railway company for agreeing to refrain from working the fireclay was a capital receipt. That case, again, was open to the observation of Mr. King that it was dealing with what were undoubtedly the capital assets of the Glenboig Fireclay Co., and was a case in which the Glenboig Fireclay Co. was the recipient of the money.

The next case was *Anglo-Persian Oil Co., Ltd.* v. *Dale* (4), where £300,000 had been paid by the Anglo-Persian Oil Co. to its commission agents in the East to cancel their contract. That sum was held to be a proper revenue debit for the Anglo-Persian Oil Co., on the ground, in my opinion, that it was a lump sum to get rid of onerous revenue payments to the agents in the future. That, in my opinion, appears from A the passages in the judgments on pp. 260, 261, 262.

In Van den Berghs, Ltd. v. *Clark* (5), a payment of £450,000 was made by one of the companies concerned (the Dutch company) to the English company for the surrender of the rights of the English company under an agreement whereby the whole of the English company's business was B so closely woven into the business of the Dutch company that the view was taken that this £450,000 ought to be treated as capital.

Mr. King relied, so far as authority was concerned, upon *B. W. Noble, Ltd.* v. *Mitchell* (6), which was a case where a payment of £19,200 was made to a director to get rid of his services, as he was thought to be undesirable. C It was held there that that was a proper charge against revenue. Mr. King argued that that case has a bearing upon the present case, because, just as there the director was got rid of once and for all, so here Hewitt and Kellett, Ltd., were got rid of once and for all, and the advantage of getting rid of the director in that case might be said to be as D enduring as was the getting rid of a competitor in the present case. But, in my opinion, the *ratio decidendi* which was adopted in that case was that the difficulty which had arisen with this director was the sort of difficulty which may be expected to arise in the ordinary course of a company's business, and therefore is an ordinary incident of the company's E business, and may properly be charged against the profits of the year. That view appears to me to be shown by the judgment of ROWLATT, J., at p. 415, and by the judgment of SARGANT, L.J., at p. 422.

The Solicitor-General also referred to *Southwell* v. *Savill Brothers, Ltd.* (7), where it was held that money spent by a brewery company F in unsuccessfully attempting to get more brewery licences was equally a capital charge as in cases where the money was spent in successfully getting brewery licences. It was argued for the Crown that that shows that it is not necessary, in order that the expenditure should be of a capital nature, that there should be any tangible asset created by the G expenditure. If the money is spent for the purposes of the trade, and the expenditure would, if successful, produce either a capital asset or an asset of an enduring nature, or an advantage of an enduring nature, which is of a capital nature, it is equally a capital payment if the expenditure is unsuccessful. From this case, I think it may be deduced that one H cannot test the question as to whether the payment is properly a capital or a revenue payment by seeing whether it can be shown to be productive. Nor do I think that the argument of Mr. King, that what was produced by the expenditure in these cases was impalpable or intangible or incalculable, is a sound argument for holding that it must be treated as being of a revenue nature. In fact, in both these cases, the payments which were made had, as a result, the removal or the prevention of a trade competitor, who would not have been subject to the rules of the Association. In my opinion, those payments created for the members of that Association advantages of an enduring nature, and of such an enduring nature, I think, as properly to be treated as capital, and not to be treated as revenue. It appears to me that the present case is really a stronger case than the case of *Atherton* (1), because in the present case there was this company, Hewitt and Kellett, Ltd., which, by reason of this payment, ceased to exist, and the land on which its business had been carried on was, for the purpose of boiler-making, sterilised for the period of 20 years. All its assets were disposed of, and it does not appear to me to make any difference whether they were acquired by the members of the Association for the purpose of exploitation in the business of boiler-making, or for the purpose of being scrapped. They were equally acquired by the members of the Association, and such acquisition appears to me to be clearly a capital acquisition. The fact that the value of that acquisition is doubtful is, of course, applicable to almost every trade acquisition, and was equally applicable to the value of the fund created in *Atherton's* case (1); but in both cases the trader had himself put a value upon the advantage which he was acquiring. In *Atherton's* case (1), the sum transferred to this pension fund was the sum which the directors of the company thought it wise to set aside, and here the sum paid by the Association was the sum which they thought it worth while to pay to remove from the arena a possible competitor, who was supposed to be going to purchase the business of Hewitt and Kellett, Ltd.

In the case of John Thompson (Wolverhampton), Ltd., the result to the Association and its members of the grant of £5,500 was that Wilsons Boilermakers of Glasgow were brought into the combine, and their profits became subject to the pool, which was necessary, in the opinion of the Association, to keep the scheme going. In that case, too, I think that the payment was of a capital nature, because it created what I think may properly be called an asset, or at least an advantage of an enduring nature.

For these reasons, with the greatest possible respect to the commissioners, I am unable to agree with their conclusion on the first case, and I accordingly allow the appeal in the case of Hewitt and Kellett, Ltd., and dismiss the appeal in the case of John Thompson (Wolverhampton), Ltd., with costs.

Appeal allowed in the first case. Appeal dismissed in the second case.

Solicitors: *Solicitor of Inland Revenue* (for the Inspector of Taxes); *Gregory, Rowcliffe & Co.*, agents for *Addleshaw, Sons & Latham*, Manchester (for Joseph Adamson & Co.)

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

CARTWRIGHT *v.* LILLESHALL CO., LTD.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Romer and MacKinnon, L.JJ.), **November 1, 1937.**]

Master and Servant—Workmen's compensation—Application for medical reference—Previous medical referee no longer available—"Exceptional difficulty"—Medical certificate signed in firm name of a partnership of doctors — "Report" — "Certificate" — Workmen's Compensation Act, 1925 (*c.* 84), *ss.* 12 (3), 19 (2).

The appellants applied to the registrar under the provisions of the Workmen's Compensation Act, 1925, s. 19 (2), for the appointment of a medical referee. The registrar refused the application, and on appeal the county court judge upheld his decision. The grounds of the judge's decision were that it was not possible to appoint as referee a doctor who had acted in that capacity in a previous reference between the same parties. This doctor had given up practice, and was no longer a medical referee. There was, therefore, no machinery available for compelling him to give evidence under a reference, or to produce certain X-ray photographs. In the judge's view, these facts made the case one of exceptional difficulty within the words of the section. The respondent had been examined on behalf of the appellants by two doctors, who were working in partnership, and their certificate was signed in the firm name:—

HELD: (i) once a county court judge has decided that a matter ought to be settled by arbitration, he is bound to refuse to allow a medical reference.

(ii) on the facts of this case, the judge was justified in regarding the case as one of exceptional difficulty within the meaning of those words in sect. 19 (2), and in refusing to order a reference.

(iii) the word "report" in sect. 19 (2) and the word "certificate" in sect. 12 (3) should be given the same meaning.

(iv) a report signed by a firm name is within the requirements of the Act, provided that the injured person has been examined by all the partners. It is, however, desirable that each doctor who has examined him should sign separately.

[EDITORIAL NOTE. The important point in this case is that in the case of a medical report or certificate, if the examination had been made by only one member of a medical partnership it should be signed by the partner making the examination in his individual name and not in the partnership name. The partnership name should only be used where all partners have taken part in the examination and even in that case it is better that the doctors should sign individually.

AS TO MEDICAL REPORTS, see WILLIS'S WORKMEN'S COMPENSATION, 30th Edn., pp. 400-403; and FOR CASES, see DIGEST, Vol. 34, pp. 376-378, Nos. 3051-3062.]

APPEAL from the decision of His Honour Judge SAMUEL, given at the Madeley county court on Apr. 24, 1937, upon an application for the appointment of a medical referee. The facts are fully set out in the judgment.

Trevor H. Hunter, K.C., and *P. Malcolm Wright* for the appellants.

F. W. Beney for the respondent.

SIR WILFRID GREENE, M.R.: This is an appeal by the employers against a decision of the county court judge sitting in the county court of Shropshire at Madeley whereby he affirmed, but on different grounds, a refusal by the registrar to direct a reference under the Workmen's Compensation Act, 1925, s. 19.

The workman was a carter at the appellants' colliery, and, on Aug. 14, 1934, he was kicked on the head by a pony which he was leading, and suffered severe injuries, including a fracture at the base of the skull. He received full compensation for a time, and, on Oct. 10, 1934, the employers set in motion the machinery of sect. 18, which provides for periodical submission to medical examination. The workman was examined on behalf of the employers, and, as he was dissatisfied with the report of that examination, he sent in a counter-certificate signed by a medical man engaged by himself. As the result of that difference of opinion, the details of which are not material, both parties applied under sect. 19 (2) for a reference to a medical referee. An order was made, and the matter was referred to Dr. MacLeod by an order of Oct. 31, 1934. The doctor issued his certificate on Nov. 13, 1934. It is necessary to look at the language of that, because it is upon the matters which appear upon the face of that certificate that the county court judge has largely based his decision. The certificate of Dr. MacLeod reports that he has examined the workman, and he certifies that:

> The condition of the said J. H. Cartwright is as follows:—He suffers from frontal headache. He is giddy if he stoops for any length of time. He has partially recovered from effects of accident of Aug. 14, 1934, and is fit for light work on the surface only. . . . The incapacity of the said J. H. Cartwright. I have inspected the stereoscopic X-rays taken in this case and there is no doubt about the fracture of the skull at base of anterior fossa. He should not do full work nor go down a pit before Mar., 1936.

In the face of that, the employers took no further steps in the matter until Jan., 1937, when they again required the workman to submit himself for examination under sect. 18. On Jan. 27, 1937, the result of that examination was embodied in a certificate, and I must read that certificate, because it raises one of the points in this appeal. It is on a printed form, dated Jan. 27, it gives the workman's name, the colliery at which he worked, and his address. Then it says:

> We hereby certify that we examined John H. Cartwright on Jan. 27, 1937, under the Workmen's Compensation Act, 1925, s. 18, and in our opinion (i) he has wholly recovered. The grounds of our opinion are:—We find no physical cause for either the pain or giddiness he complains of.

Then comes the signature, Legge & Legge. A point arises on that certificate as to whether it is a compliance with the requirements of the Act. I will deal with that point, which stands by itself, after I have dealt with the first ground on which the county court judge came to his conclusion. Mr. Cartwright again countered that by a certificate signed by his own doctor, Dr. Kennedy, who on Feb. 5 certified that the workman was:

> unfit for his usual employment for the following reasons: (i) there is evidence of pressure on the brain due to the original injury; (ii) he has fits of giddiness and blurred vision at times; (iii) he suffers from severe cerebral headaches; (iv) his nerves and general tone is lowered by reason of the shock due to original injury.

> He is fit for suitable light work which does not entail stooping or prolonged accommodation of the eyes.

I should have mentioned that, as the result of the certificate of Dr. MacLeod, in 1934, the workman was taken back and employed at light work at the colliery, with the result that his compensation was reduced ultimately, I think, to 1*s.* 1*d.* a week, that sum being, of course, based A on the difference between his pre-accident wage and what he was receiving in respect of the light work he was doing. That payment continued, and it was in order to stop that payment that this action was taken by the employers in Jan., 1937. On this occasion, the workman declined to join in an application to the registrar for the appointment of a medical B referee, and accordingly the employers themselves made the application under sect. 19 (2) of the Act, there being, in the case of an application by one party, an appeal to the judge. The registrar, on Mar. 3, 1937, refused the application, in these terms:

> I refuse to make an order on the following grounds: that the real point at issue C is not a medical one entirely, but as to whether the workman is to be believed.

Against that refusal by the registrar, the employers appealed to the county court judge. The appeal was dismissed, but on different grounds, as the judge held that the ground of the refusal of the registrar was one which was a bad ground in law. D

Before I come to the reasons given by the county court judge, I should refer to the relevant provisions of the Act. Under sect. 19 (2), where the workman has been examined by medical practitioners and they cannot agree, taking it shortly, then the registrar, on application by both parties, or, subject to appeal to the judge, by one of the parties, may E refer the matter to a medical referee. Then comes this proviso, which is the one on which the matter turns:

> Provided that where the application is made by only one of the parties, the registrar, or on appeal the judge, if he is of opinion that, owing to the exceptional difficulty of the case or for any other sufficient reason, the matter ought to be F settled in default of agreement by arbitration, shall refuse to allow the reference.

The county court judge refused to allow the reference, on the grounds which I will indicate in a moment. Before I come to the grounds, I wish to say this on the effect of that proviso. Under it, the county court judge on appeal is the person to decide whether the matter ought G to be settled, in default of agreement, by arbitration. Once he has formed that opinion, the duty of refusing to allow the reference is imperative. He is bound to refuse it. He is made the judge of the question as to whether or not the matter ought to be settled by arbitration, but, before he can decide that, the section points out the grounds H upon which he shall be entitled to form that opinion. Those grounds are the exceptional difficulty of the case, or any other sufficient reason. For reasons which I cannot help thinking are most beneficial, the county court judge in these cases is made the person to decide these matters. It would be lamentable if there were a right of appeal to this court, and if this court were at liberty to reverse the finding of the county court judge, on the ground that, if it had had to deal with the matter itself, it would have come to a different conclusion. The grounds upon which the Court of Appeal can interfere are, in my opinion, of a quite limited nature. If the county court judge has misdirected himself in law, if he has failed to take the matter properly into his consideration, if he has formed his opinion without there being any facts before him on which he could properly and judicially form such an opinion, then those are grounds of law why his decision should be upset. But, in so far as his decision is not liable to attack upon those grounds of law, and is merely a decision of fact within the permitted boundaries, it is a case with which this court cannot interfere.

Bearing in mind those principles, which were not really seriously controverted, I examine the reasons of the county court judge. It appears that Dr. MacLeod, the medical referee who examined the workman in 1934 and certified as to his condition, had retired from practice, and, accordingly, it was no longer possible, if a reference had been ordered, to do what the regulations contemplated as being desirable, namely, to appoint Dr. MacLeod himself the medical referee under any new reference. The provisions as to that matter are to be found in the Workmen's Compensation Rules, r. 98 (1), proviso 3, which is to this effect :

> Provided also, that where a medical referee has been previously summoned as an assessor, or there has been a previous reference in any case, any subsequent summons or reference in the same case shall, if possible, be sent or made to the same referee, and shall in any case be accompanied by the previous report or certificate (if any) of the medical referee, or by a copy thereof.

The county court judge quite fairly, on the face of his judgment, was forming the opinion that the history of this case, involving, as it had done, acute differences of opinion between the medical practitioners who had examined the man, and going back as far as it did to 1934, was one in which it would be desirable that the medical referee, if one were appointed, should be in a position to compare the man's condition in 1934 with the condition to-day. It is manifest that that view of the matter was quite strongly present to his mind. The two particular points on which he saw the difficulty in directing a reference were these. In 1934, as appears from Dr. MacLeod's certificate, there were available to him X-ray photographs which were material and were of assistance in forming his diagnosis and making his report. That was one point. The other point is the desirability of Dr. MacLeod's being available to give assistance. Dr. MacLeod, in what was obviously a complicated case giving rise to the difference of opinion, had seen the man in 1934, and some assistance from him to any new medical referee would be desirable, for the purposes of comparison. The county court judge took the view that, on the matters as presented to him, Dr. MacLeod being out of practice, there was no machinery for compelling him under a reference to come in and help, and there was no machinery for ensuring that these X-ray photographs, which presumably were still somewhere in existence, would be available to a new medical referee. The actual language of the county court judge's judgment is this:

> In my view the workman sustained a serious injury. None of the reports made by the employers' doctors refer to a fracture of the skull. The medical referee on Nov. 8, 1934, found the workman was suffering from the consequences of a fractured skull. A
> R. 3 (*c*) of appendix C. to the rules and regulations of the said Act stipulates that where possible, in a case where a previous reference has been made, any subsequent reference shall be made to the same medical referee. Dr. MacLeod is no longer a medical referee. If he were, I might send the matter to him. He was seen and probably knows where the said stereoscopic X-rays are. Having regard to the conflict of opinion between the aforesaid doctors in the matter, I think that the said X-rays would materially help any medical referee should I agree to a reference herein. I know of no means which would assist in the produc- B
> tion of the said X-rays for inspection other than in an arbitration of the matter in open court. Dr. MacLeod might also be called thereat as a witness. This, in my opinion, constitutes an exceptional difficulty or other sufficient reason in the case and is enough to dismiss the appeal.

In my judgment, upon the facts of this case it is impossible to say that the material before the county court judge was insufficient to justify C
him, as a matter of law, in coming to the conclusion that he did. It seems to me that the difficulty of the case, its history, the differences of opinion, and the importance of this evidence from the point of view of comparison, justified him in forming the opinion that he did, namely, that, owing to exceptional or other difficulties, the matter ought to be D
settled by arbitration. It is quite impossible for this court to interfere with that conclusion.

The other matter is one that it is desirable to deal with it as it may affect the practice in future. The certificate in this case, which was the certificate required by sect. 12 (3) of the Act, a certificate of the medical E
practitioners employed by the employers to examine the man in Jan., 1937, is signed Legge & Legge. That is in fact the professional name of two doctors who carry on partnership together. We are told that one is a surgeon and the other is a physician. On the face of this certificate, which is in the plural, are the words: "we hereby certify that we F
examined." Incidentally, the form of the certificate, which is a printed form, has printed on it, "I hereby certify." That is struck out, and "we" is substituted, meaning clearly that this was an examination by more persons than one. The certificate on its face therefore purports to be a certificate of examination made by more persons than one, and G
the persons who made it sign it themselves as Legge & Legge. If they had signed individually, each by his own signature, no possible question, in my opinion, could have arisen with regard to the form of that document, provided always, of course, that the examination was one which had been conducted by both signatories. There is nothing in the H
language of the relevant provisions of the Act to suggest that a joint examination by two medical men would not satisfy its requirements. The county court judge took the view that this document was insufficient, and he states his reasons in this language:

> In my view the said certificate does not comply with the provisions of the said

> sect. 12. It purports to contain the opinion of more than one doctor and is signed by a combination of persons who might be anybody but doctors; therefore in my opinion all that took place subsequent to the giving and service of the said notice is a nullity.

If the county court judge intends there to suggest that a document purporting to contain the opinion of more than one doctor is a bad document, in my opinion, he is wrong, provided, of course, that the opinion which purports to be that of more than one doctor is in fact the opinion of more than one. But it is the signature which is the point which is mainly relied upon by him. The certificate is signed in the firm name of Legge & Legge. He says that it is signed by a combination of persons who might be anybody but doctors. The actual language of the section with regard to this certificate is to be found in sect. 12 (3). Some assistance is also to be obtained from sect. 19 (2). Sect. 12 (3)—one of the cases in which the employer can diminish or stop a weekly payment—provides:

> where the medical practitioner who has examined the workman under sect. 18 of this Act has certified that the workman has wholly or partially recovered, or that the incapacity is no longer due in whole or in part to the accident, and a copy of the certificate (which shall set out the grounds of the opinion of the medical practitioner) together with notice of the intention of the employer at the expiration of 10 clear days from the date of the service of the notice to end the weekly payment, or to diminish it by such amount as is stated in the notice, has been served by the employer upon the workman.

There is no suggestion that the certificate is deficient, in the sense that it is not a true copy of what these medical gentlemen signed in the way in which they did sign it. It is therefore a copy of the actual document which was signed. It sets out the grounds of opinion, and it is not contested on that point. When sects. 18 and 19 are looked at, it is found that, under sect. 18, the workman is to submit himself when required by his employers for examination by a duly qualified medical practitioner, provided and paid by the employers. Sect. 19 (2) says:

> Where a workman has so submitted himself for examination by a medical practitioner, or has been examined by a medical practitioner selected by himself, and the employer or the workman, as the case may be, has within 6 days after such examination furnished the other with a copy of the report of that practitioner as to the workman's condition, then, in the event of no agreement being come to between the employer and the workman as to the workman's condition or fitness for employment—

then the consequences follow—i.e., application may be made for a reference.

Mr. Beney, on behalf of the workman, argued that a report under sect. 19 (2) was something different from a certificate mentioned in sect. 12 (3). I am unable to accept that view. There is no requirement in the Act with regard to a report as something distinct from a certificate, and the fact that, under the Act, the report of the practitioner is to be handed to the medical referee, in order that he may inform himself from it, appears to me to confirm the view that I have formed, because, if Mr. Beney's argument be right, there would be no necessity to send to the medical referee what is the essential and important document, namely, the certificate. In my opinion, the two things are the same, although described in different language. The first question is this: Is the document in this case a copy of the report of the medical practitioner? It was not disputed, and is not disputed, that the examination was made by both parties. In fact, it is the report which they have furnished. It is the report, complete with the signature with which A they sign it, and it contains the statutory material. In my opinion, that report is in fact what the Act requires it to be, incontestably a report of the examination of the workman's condition, and this is a true copy of that. Therefore, the fact that it is signed in the firm name, which, after all, is merely shorthand for the signature of the two, brings it within B the Act.

I should say that, on the facts of this case, that document is in order. But, if the examination had been by one partner only, and not by two, then, in my judgment, this certificate would not be a proper certificate within the Act. The certificate should show on its face C that the person giving the certificate is the person who made the examination, and, if there is only one person who has made the examination, and the certificate purports to be the signature of two or more, or on behalf of two or more, this certificate on the face of it would not show which of the two or more had made the examination. I cannot help thinking D that, even in cases which must be exceptional cases, where both partners in a firm of two doctors, or where more, if there are more, have jointly made the examination, in order to avoid any possibility of dispute and litigation, it is very desirable that each doctor who has made the examination should individually sign. Nevertheless, that is not, in my opinion, E a strict and necessary requirement, where the facts are as they are here. It is, however, always a very desirable practice, in order to avoid doubt and confusion. The appeal must be dismissed with costs.

ROMER, L.J.: I agree, and have nothing to add. F

MACKINNON, L.J.: I agree.

Appeal dismissed with costs.

Solicitors: *Peacock & Goddard*, agents for *Elliot, Smith & Co.*, Mansfield G (for the appellants); *Sharpe, Pritchard & Co.*, agents for *R. A. Willcock, Taylor & Co.*, Wolverhampton (for the respondent).

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

Applied. PRIDE OF DERBY & DERBYSHIRE ANGLING ASSOCN., LTD. *v.* BRITISH CELANESE, LTD. [1952] 1 All E.R. 1326.

CROSTON *v.* VAUGHAN.

[COURT OF APPEAL (Greer, Slesser and Scott, L.JJ.), **October 25, 26, 27, 1937.**]

Street Traffic—Motor vehicles—Stop-light automatically operated by brakes—Hand-signals—Highway Code—Road Traffic Act, 1930 (*c.* 43), *ss.* 30 (1) (*h*), 45—*The Motor Vehicles* (*Direction Indicator and Stop Light*) *Regs.,* 1935 (*S.R. & O.,* 1935, *No.* 897).

Torts—Contribution between joint tortfeasors—Jurisdiction to apportion blame without special application—"Proceedings"—Jurisdiction of Court of Appeal to vary proportions fixed by judge—Law Reform (*Married Women and Tortfeasors*) *Act,* 1935 (*c.* 30), *s.* 6 (1) (*c*), (2).

The appellant and respondent were defendants in an action for damages for personal injuries caused by negligence. The appellant had suddenly and violently applied her brakes while driving her motor car in a stream of traffic. She gave no signal by hand of her intention to stop, but her car was fitted with a stop-light which was automatically operated when the brakes were applied. A car travelling immediately behind her was unable to pull up in time, and collided slightly with the appellant's car. The respondent's car, the last one in the stream of traffic, was also unable to pull up, and collided violently with the car in front. The plaintiff was a passenger in the respondent's car, and suffered severe injury. At the trial, the judge found that the appellant had been negligent, in that she stopped too suddenly and failed to give any warning by hand-signal. The respondent was also found to have been negligent, in that he failed to apply his brakes sufficiently to stop, but instead first pulled out to his off side in an endeavour to overtake. Immediately after judgment had been delivered, an application was made to the judge to apportion the blame between the two defendants in accordance with the provisions of the Law Reform (Married Women and Tortfeasors) Act, 1935. The judge apportioned the blame, two-thirds to the appellant and one-third to the respondent:—

HELD: (i) such an application was within the terms of the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (2), and the judge therefore had jurisdiction to make an apportionment.

(ii) such an apportionment was a matter of discretion for the judge, and would not be disturbed by the Court of Appeal unless it could be shown that the judge had acted upon a wrong principle in law.

(iii) (SLESSER, L.J., dissenting) a stop-light automatically operated by the brakes of a motor car does not give sufficient warning of the intention of a driver to slow down or to stop. A hand-signal should also be given. It is no defence to an allegation of negligence for a driver to contend that he has done everything suggested in the Highway Code, which is merely a code of suggested behaviour on the road, and is not binding as a statutory regulation.

[**EDITORIAL NOTE.** Apart from the important decision, from the motorists' point of view, that a stop-light is not a substitute for the usual hand-signal, this case also considers two points of practice arising under the recent legislation allowing apportionment of blame and damages in actions of tort. Where apportionment is desired, the proper procedure is to apply immediately after judgment is given, and apparently the judge has jurisdiction to apportion on his own motion without any application being made. The judge, having heard the witnesses, is in a better position to make the apportionment than the Court of Appeal, and an appeal against such apportionment must be unsuccessful unless it is shown that the apportionment is such that the judge must have acted upon a wrong principle.

AS TO APPORTIONMENT OF DAMAGES, see HALSBURY, Hailsham Edn., Vol. 23, pp. 665, 666, para. 944; and FOR CASE, see DIGEST, Supp., Tort, No. 108*a*.]

Cases referred to:

(1) *Merryweather* v. *Nixan* (1799), 8 Term Rep. 186; 42 Digest 979, *95.*

(2) *Hood Barrs* v. *Cathcart,* [1894] 3 Ch. 376; 27 Digest 130, *1058*; 63 L.J. Ch. 793; 71 L.T. 11.

APPEAL from a decision of PORTER, J., at the Liverpool Assizes, dated Feb. 9, 1937. A

The facts of the case are fully set out in the judgments.

The Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6, provides as follows:

> (1) (*c*) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought. B
>
> (2) In any proceedings for contribution under this section the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage; and the court shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity. C

John W. Morris, K.C., and *Laurence Vine* for the appellant.

Wilfrid Clothier, K.C., and *S. Scholefield Allen* for the respondent.

Morris, K.C.: Under the Highway Code, the obligation on a driver is to signal with the hand unless an automatic signal is used. Here a stop-light was used, and there was therefore no need to give a hand-signal. D

Clothier, K.C.: A stop-light can never comply with reg. 37 of the Highway Code. The obligation on a driver is to give an indication of his intentions in good time. A stop-light lights up only when the brakes have been applied, or, at the best, at the same time as the brakes are applied. That cannot be giving an indication in good time. A direction-indicator, if operated in good time, may be as good as a hand-signal. It is submitted that the words "mechanical indicators" in the regulation mean traffic-indicators, and do not include stop-lights. The Court of Appeal should not disturb awards of proportions. There was ample ground for the view that the initial negligence was with the appellant. E F

Vine, in reply: When the brakes are applied, a stop-light shows at once, and, when a car is slowing up, the car behind has ample warning. It is submitted that the stop-light in this case gave sufficient warning. G

GREER, L.J.: This is an appeal from an order made by PORTER, J., at the trial of an action for damages for personal injuries. The appeal is on the ground that, when he addressed himself to the question as to the proportions in which, under the law as it now exists, he was to apply the liability to the damages payable by the two drivers whom he held to blame, it is said by the appellant that he was wrong in the decision that he gave in distributing two-thirds of the blame to Mrs. Buckley and only one-third of the blame to Mr. Vaughan, the driver of another motor car. In my judgment, we cannot interfere with the decision of H the judge. In matters of this kind, which usually arise in Admiralty actions, this court is very reluctant to interfere with the estimate, formed by the judge who tried the case, of the proportion in which the damages should be distributed.

In the present case, the accident happened at 3 p.m. on Sunday, Apr. 19, 1936, at a time when the light would be very good, and anybody could see any signs, whether by light or by hand, that were made by any of the cars in what has been called the procession. In this case, there was a long procession of cars. The cars, proceeding in the same direction, had to come to a stop, for some reason which was not proved at the trial. To borrow a word from detective stories, there were only five " suspects " concerning whom the judge had to inquire, and they were in this order. In front of the five was a car driven by a man whose name is not before the court. Just behind him was an Austin car driven by Mr. Dell. Then, behind that, was a Hillman Minx, 10 horse-power, driven by Mrs. Buckley. Then behind her there was a Standard car, driven by a gentleman named Walker, and behind him a car, driven by Mr. Vaughan, in which the injured passenger was. The judge eliminated from these " suspects " everybody except Mrs. Buckley and Mr. Vaughan. There has been no appeal against his decision that Mr. Walker and the other drivers had nothing to do with the accident which happened to the lady who was in Mr. Vaughan's car.

In giving his decision, the judge had, first of all, to determine whether or not these two were guilty of negligence which brought about the collision. It was not a case in which the action was based on a breach of any statutory regulation, or on a breach of any duty imposed by rules which had the effect of a statute. The sole question was whether the accident was due to the negligence of either of these two drivers or of both of them. The judge had, first of all, to deal with the question of liability, and in dealing with the question of liability he said this :

> There was [referring to Buckley's car] a violent pulling up.

That is to say, she pulled up quite suddenly, and later than she ought to have done. That is the first ground on which he held her to be liable in respect of the damage suffered by the lady in Vaughan's car. Then he said :

> I think she is in error in imagining that a signal with the stop-light behind is any substitute for a hand-signal. . . . I believe it to be a wise and sensible protection for everybody whether they have a stop-light or not [that is, to give the signal by the hand]. If she had also given a hand-signal at that time, no accident would have occurred.

I understand the judge there to be deciding that this lady was negligent in two respects. First of all, she was negligent in not stopping in time, making it necessary for her to stop violently, so as not to give the others behind her sufficient time to adjust their manœuvres to hers. " Stopped violently " means, I think, stopped too late. The judge also blamed her (and, in my judgment, rightly blamed her) for not having put out her arm, either just immediately before the violent stop or at some earlier

period when she saw that the one in front of her was going to stop. As I understand it, there is no appeal from that decision as to the liability of these two drivers of the cars. If the appellant were going to complain that the judge was wrong in his findings, he would have had to appeal to this court on the question of liability, and to have asked for either judgment in his favour or a new trial, on the ground that the judge mis- A
directed himself in holding that there were two grounds of liability, two faults on the part of Mrs. Buckley, when there was, in fact, only one. In my judgment, as there is no appeal, and can be no appeal, in respect of those findings, the judge was bound of necessity, when he was asked to distribute the liability to pay damages, to act upon the B
findings he had given in respect of the liability. It would have been absurd for the judge to say: " Though I have found, in deciding liability, that this lady was guilty of two faults, and that the other defendant, Mr. Vaughan, was guilty of only one fault, I am now going behind my own finding for the purpose of distributing the damages, and am going C
to make a judgment wholly inconsistent with the judgment which I have already given."

In my view, we are bound by the judge's judgment as to liability, and we must therefore assume that he was entitled to approach the question of the distribution of liability in the light of the findings which D
he had already given, and which are unquestioned, and cannot be questioned, in this court, in respect of the liability of the two defendants. In my judgment, that is sufficient to dispose of this appeal, and to induce me to say that, in my view, the appeal ought to be dismissed with costs. There has been a good deal said about the effect of the statutory rules E
and orders made under the Road Traffic Act, 1930, and of the code which was made under the provisions of the 1930 Act. I do not find it necessary to refer to the provisions of the statute, but I want to say, with reference to the statutory rules and orders, that they can only be used as a guide to see whether there ought to be a F
finding of negligence or no negligence. A trial judge (or, it may be, a jury) is confined to the question of whether the action of the driver is consistent or inconsistent with the regulations. The other document, that is to say, the code, is not binding as a statutory regulation; it is only something which may be regarded as information and advice to G
drivers. It does not follow that, if they fail to carry out that which is provided for by the code, they are necessarily negligent. It only provides that they may be found to be negligent if they do not carry out the provisions of the code. Nor is it sufficient excuse for them to say, in answer to a claim for negligence: " We did everything that is H
provided for in the code."

I attach some importance to r. 37 as being good advice to people in charge of motor cars. Rule 37 says this:

> Before you stop or slow down or change direction, give the appropriate signal clearly and in good time.

Now, before a car begins to slow down, it cannot give an "appropriate" signal of any sort by means of the stop-light, because the stop-light will not come into operation until the brake is applied, and therefore I gather that this piece of advice means: "Before you put on the stop-light, give an appropriate signal." The signals are all dealt with in a later A part of the code, which shows the kind of signals "appropriate" for the various occasions.

It is said that no careful driver ever gives any sign when he has got a stop-light. The judge has had great experience as a driver of cars, though he is not a professional driver, and there is no member of this B court, nor, I suppose, anyone who owns a car, who has not had a very large experience of sitting either behind or beside a competent driver, and it seems to me to be the custom of the really careful driver to give the hand-signal when he is about to slow down. As the judge finds, it is more readily observed than the signal by the light. It is higher up, C for one thing; the hand is just level with the eye of the driver of the other car. I think the judge was entitled to say that the absence of a signal of that kind at a time when it ought to be given, before the sudden putting on of the brake, is sufficient to enable him to say that, in that respect, the driver, Mrs. Buckley, is to blame, as is the fact that she put D on her brake too late before the collision, and, that being so, I think it is impossible to disturb the finding of the judge, having regard to what he has decided on the question of liability, on the question of the proportions of blame. The appeal should be dismissed, and with costs.

E Slesser, L.J.: This is an appeal in a matter arising under the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (1) (*c*), which provides, among other matters, for contribution among tortfeasors. Ever since the well-known case of *Merryweather* v. *Nixan* (1) and other cases which have followed it, it has been undisputed as a general rule F that at common law as between joint wrong-doers themselves one who has been sued and compelled to pay the whole damages has no right to indemnity. But the law has now been altered. In the present case, there is no question but that the plaintiff, Mrs. Croston, was entitled to recover as against the two alleged wrong-doers, Mr. Vaughan and Mrs. G Buckley, and before 1935, as I have said, no question of contribution as between them could have arisen. But now the law is otherwise. In this case, after it had been decided that Mrs. Croston was entitled so to recover, an application was made to the court, with consent, that the judge should fix the contributions as between the two tortfeasors so H found, Mrs. Buckley and Mr. Vaughan. In my opinion, that procedure was one which was properly within the judge's jurisdiction, in that it was a proceeding for contribution within the meaning of sect. 6 (2) of the 1935 Act, which, having laid down in sect. 6 (1) (*c*) the liability for contribution, provides in subsect. (2) that:

> In any proceedings for contribution under this section the amount of the con-

> tribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage. . . .

I am satisfied on the authorities that it is proper to say that this application was in the nature of a proceeding. It was a *lis* arising out of the original action, and was a proceeding which comes within the language of the section, as decided in such a case, for instance, as *Hood Barrs* v. *Cathcart* (2).

In those circumstances, I agree that this court would be very loath to disturb the fixation of contributions as between the tortfeasors which has been assessed by the judge, and, bearing in mind the cases which have arisen in Admiralty law, both the earlier question of contribution, when the contributions were equal, and the present provisions, as arising under the Maritime Conventions Act, 1911, the matter would normally be one entirely for the discretion of the judge, with which this court would not interfere. The matter is brought before us, however, as I understand the argument of Mr. Morris, upon this footing. Mr. Morris says that the judge, in fixing the respective contributions, which are a two-thirds liability on the part of Mrs. Buckley and a one-third liability on the part of Mr. Vaughan, has proceeded upon incorrect principles in law, and that therefore he is not asking us merely to disturb a matter which would primarily be within the judge's discretion. He says that the judge has taken into account matters which he should not have taken into account in assessing the liability of Mrs. Buckley. As regards one of the arguments of Mr. Morris, speaking for myself, I am entirely against him. I think it was within the competence of the judge to decide the manner in which this accident happened. He saw the witnesses, and he is the best judge of the credibility of their accounts of the occurrence. What he has found, and I accept it as his finding, is that Mrs. Buckley was wrong in saying there was no violent pull-up—that is, violent pull-up of her car, following, as she was, Mr. Dell. He states his reasons as to why he comes to the contrary conclusion, and finally states that there was a violent pull-up, and that she pulled up a great deal faster than a car usually does. So far, as I say, I am against Mr. Morris's contention that there is anything to be considered on this appeal to contradict that finding of the judge. The judge gives his reasons, such as the widening of the distance between her and Mr. Dell and the like, into which I need not go, because I accept the judge's finding on that part of the case.

But the judge, as Greer, L.J., has said, has found a second ground of liability on the part of Mrs. Buckley. He has said that:

> She is in error in imagining that a signal with the stop-light behind is any substitute for a hand-signal.

During the evidence, Mrs. Buckley, being taxed with her failure to give a manual warning of her pulling-up, said she considered that the stop-light (which, there is no dispute, is automatically kindled when the brakes are in the least degree put on) was a sufficient reason for her not using a manual signal. As I read the judge's judgment, he did take that into account in assessing her degree of liability; that is to say, he took into account that she was liable on two heads, not merely that, if she had used the hand-signal, there might not have been an accident, but that she was negligent in not using a hand-signal. He took that into account in assessing her degree of contribution, and, if Mr. Morris is right in saying that he should not have taken that into account, then I think that the factors which operated in his mind are appealable on the question of law, that he allowed his mind to be influenced in part by an ingredient which should not have entered into his consideration.

Now, therefore, I approach this question, which I think is an extremely important one, affecting, I suppose, all motorists, whether or not there is in itself any liability in not using a hand-signal when the car has affixed to it a red stop-light—this altogether apart from the fact that this lady, as is conceded by there being no appeal against the decision in favour of the plaintiff, was negligent in her manipulation of the car. Did her negligence include or extend to the failure to use the hand-signal? I have come to the conclusion, with some hesitation, that, having regard to the fact that negligence necessitates a failure of duty, there was no failure of duty on the part of this lady in not using a hand-signal. The reason why I come to that conclusion is this. By the Road Traffic Act, 1930, there is given power to make regulations, and one of the regulations which the Minister may make under sect. 30 (1) (*h*) is this:

> the appliances to be fitted . . . for intimating any intended change of speed or direction of a motor vehicle and the use of any such appliance. . . .

In accordance with that power, the Minister duly made regulations dated Aug. 21, 1935, in which he defines "such appliance" under the name of a "stop-light" in the following terms:

> "Stop-light" means a device fitted to a motor vehicle for the purpose of intimating the intention of the driver of the vehicle to stop or slow down.

There follow other regulations, dealing with another kind of mechanical device, called a "direction-indicator," with which we are not here concerned, for "intimating the intention of the driver to change the direction of the vehicle to the right or to the left," and a number of other regulations providing for the size and position of indicators and stop-lights. Thus, cl. 9 says:

> Every stop-light shall be fitted at the rear of the vehicle . . . and when in operation shall show a red or amber light.

In so far as the legislature has given power to the Minister to make regulations, which he has made, concerning devices for intimating the intention of the driver to stop or slow down, it seems to me that, where the driver avails himself of that device which complies with the regulations, he has sufficiently intimated his intention to stop or to slow down. The appellant having so intimated her intention, I find it difficult, if not impossible, to say that she has committed a breach of duty, when, by having the appropriate appliance, and by putting that appropriate appliance into action, she has done that which the legislature and the regulations say is sufficient to perform the duty of intimating the intention. Mr. Clothier has said that one must distinguish between the act of putting on the brake, which produces the red light, and the preliminary A intention to slow down. The regulation seems to make no such distinction. It speaks of a device—not of intimating the fact that the driver is stopping or slowing down, but of intimating the intention of the driver to stop or slow down. I assume that the reason for that is that the legislature, or the draughtsman of these regulations, took the view B that the intention to slow down, as an overt intention, is immediately expressed by the application of the brake, and that there is no anterior time to be considered before that. At any rate, that appears, in the mind of the legislature and the regulations, to be a sufficient compliance with the law. It is true that we were referred to a code called the Highway C Code, which also derives from the Road Traffic Act, 1930, but, unlike the regulations, it is of legal effect to this extent only, that a failure on the part of a person to observe a provision shall not render the person liable to criminal proceedings, but any such failure may be relied upon by any party in proceedings tending to establish or negative any liability. D But, speaking for myself, I find nothing in this Code inconsistent with the statutory regulations to which I have referred, namely, that the stop-light is an appropriate means of intimating the intention of the driver to stop or to slow down.

The reason why I come to that conclusion is this. During the case, E I had occasion to ask for, and was supplied with, the earlier Highway Code, which apparently was made before the passing of the regulations dealing with stop-lights. At that time, without qualification, it was required of persons who wished to stop or slow down or change direction that they should give an appropriate signal, which was in the nature of a F manual signal, in the case both of slowing down and of stopping, with the arm, and also different manual signals and signals with the arm for direction. But after the passing of these regulations, or about the time at which they were made, there was a limitation made upon those suggestions in the Highway Code, and it now reads that: G

> signals by drivers should be given with the arm extended from the side of the vehicle at least as far as the elbow, where mechanical indicators are not used.

It was argued by Mr. Clothier that "mechanical indicator" there is limited to a direction-indicator. I am unable to accept that view. The directions which follow with regard to the use of the arm are indifferently H applied both to signals to slow down and to stop on the one hand, and to those to turn on the other, and I see no reason why the words "mechanical indicator" are not sufficient in connotation to include both the direction-indicator and the indicator of slowing down or stopping. At any rate, I find nothing in these regulations inconsistent with what I believe to be the regulation as to the stop-light, that it is a device of a certain type permitted by Parliament to intimate the intention to stop or slow down.

In these circumstances, excluding the liability of this lady, which I say is undoubtedly proved, for stopping suddenly, what further liability has she with regard to her failure to put out her arm ? I can find none. The judge says that, if she had given a hand-signal at the time, no accident would have occurred. Equally, I suppose, it might be said that, if the red light had been observed at the time, no accident would have occurred. With regard to the distinction which Mr. Clothier makes, that she could have given the hand-signal before she started to put on the brake, in the judge's judgment I cannot find that as taking any part in his consideration at all. What he does say is that a hand-signal is easier to see than a light. He says :

> I think she is in error in imagining that a signal with the stop-light behind is any substitute for a hand-signal. It is quite impossible for people behind, seeing a stop-light, to know what to do anything like so well as they do with a signal given by hand.

That does not seem to me to draw any distinction in point of time, but to point to a distinction in the clarity of the signal given, a clarity which, as I have said, in my view the legislature has not accepted.

Therefore, with diffidence, as being constrained to differ from Greer, L.J., on this point, I think that the judge ought not to have taken into his consideration the fact that this lady, though pulling up abruptly, failed to use a hand-signal, which obligation I think she had no duty to perform. If the failure to put up the hand has failed to avoid the accident, then she has already paid for that inability in the damages which she has to pay for pulling up violently. If, otherwise, it is to be treated as a separate ingredient of liability, then, as I say, I think its inclusion is erroneous, and I think that, on that view, if it be erroneous, to include it as an additional ground for liability is really to make her pay twice over for the same offence.

In my view, therefore, having regard to the fact that the judge has also found Mr. Vaughan liable, for reasons which Greer, L.J., has stated and which I need not repeat, for one-third of the damages, I think that the contributions ought to be adjusted, and, for want of any better guidance, I would be inclined to take the view expressed in the Maritime Conventions Act, 1911, s. 1 (1) (*a*), which provides that, if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally. In my view, this appeal should be allowed, and the contribution adjusted, making the liability of Mrs. Buckley and that of Mr. Vaughan equal.

Greer, L.J. : As to the question which has been faintly argued as to whether the judge was within the powers given by the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6, I need not say anything more about it now except that I agree with the view which has been so clearly expressed by Slesser, L.J.

Scott, L.J.: This appeal raises two questions of importance, one as to the duty of motorists in regard to signals by drivers, and the other as to the provisions contained in the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (2), which is intented to give effect to the right of contribution between joint tortfeasors conferred by sect. 6 (1) (*c*). Greer and Slesser, L.JJ., have stated the facts broadly, and I can refer to them briefly.

The accident happened in full daylight on Sunday, Apr. 19, 1936. There was at that time a continuous procession of cars on the road from Chester towards Holywell, in North Wales. So far as the action is concerned, five cars in the procession were referred to in evidence. The procession was moving at 25 to 30 miles an hour, with short intervals between the five cars in question, the plaintiff being a passenger in car No. 5, driven by a Mr. Vaughan, a taxi-driver. He was the first defendant sued, but the plaintiff sued also Mr. Walker, the driver of car No. 4, and a Mrs. Buckley, who was the driver of car No. 3. The accident happened in this way. The procession of cars had to stop for some reason which was apparently unknown at the time of the trial. Car No. 1 stopped; car No. 2 slowed down and stopped; car No. 3 stopped, but was very slow in doing so, and then stopped, as the judge said, violently, the distance between car No. 3 and car No. 2 being thereby substantially increased. The result was that car No. 4 ran into car No. 3, not very violently, and, whilst they were in contact, car No. 5 ran very violently into car No. 4. The momentum of car No. 5 being suddenly arrested, the plaintiff was thrown into or through the wind-screen, and was seriously injured. The judge took the view that the person chiefly to blame was the driver of car No. 3, a lady called Mrs. Buckley, and that her negligence consisted essentially in violently (by which I think he meant very suddenly) pulling up without sufficient notice to car No. 4, which was just behind her. That she was too late in applying her brakes he regarded as proved by the fact that, whereas in the moving procession there had been a distance of only 15 ft. between her car and car No. 2, when the cars were pulled up there was a very much larger distance (which the judge put at 45 ft.) between them. He found as a fact that she pulled up a great deal faster than a car usually does, and, as I have said, he called it a violent pulling up. He blamed her also for not giving a hand-signal of her intention to pull up before she did pull up, again showing that, in his opinion, she was late in taking action. I will come back to the question of signals in a moment. The judge held that Mr. Walker, the driver of car No. 4, was free from blame, on the ground that he got no hand-signal from car No. 3, and, as soon as he saw that car No. 3 was stopping, he applied his brakes as quickly as he could be expected to do so in the circumstances. Vaughan, the driver of car No. 5, the judge held to blame, these being the circumstances. Before Vaughan knew that the cars in front were stopping, he had put on his brakes slightly, and started to pull out to the off side, with a view to overtaking one or more of the cars in front. But the off side of his car was only very slightly outside the line of the car in front when he saw that there was oncoming traffic, which made the manœuvre impossible. He realised that he had to get back into the line, and did so, but, in the meantime, the cars in front of him were already engaged in slowing up, A or actually stopping. He put his brakes on hard, but was too late to stop his car, and ran into car No. 4, causing the plaintiff to be thrown through the wind-screen, as I have stated.

I now come to the matter of signals, because it is on this aspect of the case that the question of general importance arises. Under S.R. & O., B 1935, No. 897, containing regulations for road traffic and motor vehicles, which is entitled "The Motor Vehicles (direction-indicator and stop-light) Regulations," mechanical devices for intimating the intention of the driver to change direction, or stop, or slow down, were duly authorised pursuant to the statutory powers to make regulations. No question C arises as to the direction-indicator, with which we are all now familiar, but only as to the stop-light. That light, as all motorists know, shows red or amber at the rear of the car, according to the regulations, but it is always operated by putting on the brakes, and does not show at all until the brakes are put on. Rule 3 of the regulations says that :

> D "stop-light" means a device fitted to a motor vehicle for the purpose of intimating the intention of the driver of the vehicle to stop or slow down.

That wording invites two criticisms. The first is that the showing of the stop-light is necessarily ambiguous, in that it does not indicate whether the driver is intending merely to slow down or actually to stop. The E facts of the present case seem to me to suggest the desirability of a reconsideration, from the technical angle, of the question whether an ambiguous intimation such as that is sufficient to ensure the safety of a following vehicle. On this matter, it is noticeable that in Part II of the Appendix to the Highway Code, issued by the Ministry of Transport F with the authority of Parliament, pursuant to the Road Traffic Act, 1930, s. 45, the "hand-signal No. 1" is equally ambiguous with the "stop-light," as it is entitled, "I am going to slow down, or stop." On the same page of the code, immediately above "signal No. 1," Part II is entitled, "Signals to be given by drivers." Then are the material G words, "to indicate their own intentions," followed by this sentence :

> Signals by drivers should be given with the arm extended from the side of the vehicle at least as far as the elbow, where mechanical indicators are not used.

It was argued before us with force, and the argument has been accepted by SLESSER, L.J., that, when a car has a mechanical stop-light, the H obligation to give a hand-signal is dispensed with by the code, and that therefore the judge was wrong in law in holding Mrs. Buckley to blame for not giving such a hand-signal in sufficient time before she put on her brakes. I will deal in a moment with the suggested exemption from the duty of giving hand-signals, but I want here to emphasise the inadequacy of the warning given by the stop-light in such circumstances as occurred in the present case. The second vehicle had no stop-light, the driver of it gave the signal by arm, and this was, or could have been, observed by Mrs. Buckley in car No. 3. Her car had a stop-light, so had car No. 4. Both of these stop-lights were operated solely by the automatic device of putting on the foot-brakes. Until the brake was applied, no light could show. If the brake was applied too late, the light was shown too late. In any event, the showing of the light did not of itself give any indication as to whether the car showing it was being braked violently or slowly, being actually stopped or only slowed down. The result was that the judge felt bound to acquit car No. 4 of any blame for not realising earlier that car No. 3 was suddenly stopping. He held Vaughan, the driver of car No. 5, to blame for thinking that he could pass on the right, and overtake the vehicle in front, with the result that he did not make sufficiently immediate preparations to enable him to stop his car on his return to the line ; but, in dealing with Mrs. Buckley's negligence in car No. 3, the judge added that, had she given a hand-signal " at that time," by which I think he means before she put on her brakes, no accident might have occurred, because Mr. Walker in car No. 4 would have had time to pull up, and afterwards Mr. Vaughan, in car No. 5, would also have had time to pull up. He does not say this in terms, but I take this to be the meaning of his judgment. In the result, he blamed Mrs. Buckley, on the two grounds that, as he put it, " she pulled up too quickly and did not give a hand-signal." On the issue of fact, I should be quite unwilling to differ from the trial judge, who has seen the witnesses, particularly as I cannot help knowing, from my own experience, that Porter, J., is an experienced driver himself, and therefore approached the questions in the case with intimate knowledge. Further, I do not agree, for reasons which I will mention shortly, with the view of Slesser, L.J., that the stop-light regulations should be interpreted as exonerating a driver from the duty of giving any other signal. But, even if his view of the law on that matter were correct (and I humbly disagree with him), my view of the judge's findings on the facts is that Mrs. Buckley was actively negligent in not taking action early enough, when the driver of the car in front of her gave the hand-signal No. 1 of the code, and in then stopping her car with dangerous suddenness. The judge's real view seems to me to be an alternative. He considered either that she could have stopped much more gradually, in which case car No. 4 would have had notice, and would not have run into her, and car No. 5 would not have run into car No. 4, or that, if she were going to stop very suddenly, she was gravely to blame for giving to the cars following her no intimation at all of what she was going to do before she did it, and he considered that she could and ought to have given such an indication by means of her arm. I think that the judge's view of the degree of blame attaching to her might well be regarded as equal in either of those two alternatives ; so that, even if the view of Slesser, L.J., of the effect of statutory regulations in S.R. & O., 1935, No. 897, were correct, and the arm-signal is dispensed with in law where the mechanical signal is shown, I should see no reason to differ from the estimate of her blame at which the judge arrived.

But the question raised by SLESSER, L.J., seems to me to be one of great general importance. I cannot think that the mechanical directions
A contained in S.R. & O., 1935, No. 897, were intended to relieve drivers from what I may call common-sense action in emergencies. The position under the code and the regulations seems to me to have a certain analogy to that under the regulations for preventing collisions at sea. Those regulations, as practitioners in the Admiralty Court know very well, are
B very detailed and very full, expressing the results of a century or so of experience on the part of both skilled navigators and Admiralty judges. They contain many positive rules which it is the duty of a navigator to obey, but at the end there is art. 29, which reads as follows :

> Nothing in these rules shall exonerate any vessel, or the owner, or master, or
> C crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

I think that the code and the regulations contained in S.R. & O., 1935, No. 897, still leave upon every driver a common law duty of taking appro-
D priate action outside the code and the regulations in circumstances where it becomes essential in the interest of safety. I appreciate that signals different in kind from the regulation signals might be a cause of danger, and that conformity to one set of signals is of importance ; but, at the same time, if, in a particular case, where the driver sees, or ought to see, a prob-
E able need of actually stopping, but does not at once show his stop-light, or, where he sees the need of immediate stopping, even if he has begun to slow down, and is therefore showing his stop-light, he should, in my view, if practicable in the circumstances, indicate his intention by an appropriate arm-signal. We have all had occasion to see an arm-
F signal made very vigorously by repeated quick movements ; such a signal at once arrests the attention of the following motorist. Had such a signal been given by Mrs. Buckley in the present case, then, as the judge said, there would probably have been no accident, and I think that he was therefore right in saying that she was to blame for not
G giving it, and that the justification for his view is that there is upon a following car a common law duty of care which is not expressed either in the code or in the regulations. Whether that duty has been adequately performed, or has been broken, is a matter for the appreciation of the court, in all the circumstances of the case. In the
H present case, I respectfully agree with the judge.

The other point of importance in this appeal is the question of procedure which was raised before us, as to whether the judge had jurisdiction at all to enter upon the task of apportioning the blame between the two co-defendants, whom he had held liable, without some separate formal legal proceedings being instituted. I agree with the judgment delivered by my colleagues on this point, holding that he had jurisdiction, and that it was the intention of sect. 6 (2) of the Act of 1935 that the trial judge should deal with the matter, and that he had, as I say, power to dispense with any formal application. I am inclined to think that it was open to the judge, even if one of the parties had dissented, to exercise the jurisdiction of that section if he thought fit. A Reading that section as a whole, I think it was the intention of Parliament that the judge who had heard a case of primary liability at the instance of a plaintiff, should, with the knowledge of the facts as proved in evidence before him, then and there assess the apportionment, not merely of the damage, but also of the blame. The subsection is, it is true, B illogical, because it assumes the joint liability of two tortfeasors, which indeed is the postulate of the proceedings for contribution, but goes on to give the court power to exempt one of such persons from liability to make any contribution at all, or, conversely, to make the other person pay the whole. In Admiralty, the Maritime Conventions Act, 1911, is C worked in this country—as I know is the case also in the jurisdiction of other countries which have the proportional rule—by apportioning the blame for injury done in the main action, and the curious ambiguity created by sect. 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935, cannot arise. But, in spite of the illogical details of the D language of subsect. (2), I think that that section should be read as giving the judge, on the evidence that he has heard, complete jurisdiction to assess the blame of each tortfeasor just as if he had held them liable as defendants to the plaintiff for that portion of the blame only. It is possible that the Rules Committee might with E advantage consider whether any rules could or should be framed for the purpose of minimising procedural difficulties in carrying out what seems to me to have been the intention of Parliament under subsect. (2).

In the result, I agree with the judgment delivered by GREER, L.J., and am of opinion that the appeal should be dismissed, the proportions F fixed by the judge for apportioning the blame between the two defendants being affirmed, and that the judgment should be, in my view, to dismiss the appeal with costs. Conversely, I respectfully disagree with the conclusion of the judgment of SLESSER, L.J., that, in view of the interpretation which he puts upon the stop-light regulation, the damages should G be apportioned in equal halves.

Appeal dismissed with costs.

Solicitors: *Amery-Parkes & Co.* (for the appellant); *William Charles Crocker*, agents for *Buckley, Pidgeon, Watson & Blackwood*, Liverpool (for the respondent). H

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

R. *v.* BARNSTAPLE JUSTICES, *Ex parte* CARDER.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Humphreys and du Parcq, JJ.), **October 26, 27, 1937.**]

Theatres and Places of Entertainment—Cinemas—Cinematograph licences—"Premises specified in the licence"—Powers of justices—Whether provisional licence can be granted in respect of premises to be built—Cinematograph Act, 1909 (*c.* 30), *ss.* 2 (1), 5.

Crown Practice—Writs of certiorari *and* mandamus*—When issued—Justices sitting in a judicial capacity.*

The Cinematograph Act, 1909, s. 2 (1), empowers county councils, or justices where the powers have been delegated to them, to grant licences to persons to use "premises specified in the licence" for the purposes of a cinema, subject to certain terms, conditions and restrictions. A practice was stated to be in existence whereby, in cases where it was intended to erect premises for use as a cinema, justices were asked to approve the plans of the building to be erected, and thereby honourably to commit themselves or their successors to grant the licence after completion of the premises :—

HELD : (i) the Act gave no power to grant licences except in respect of premises actually in existence, and the practice was beyond the powers given by the Act, and unenforceable. It is improper for justices by a gentleman's agreement to fetter, limit, control, or in any way affect their own future decisions, or those of their successors or of other justices.

(ii) a writ of *certiorari* or a writ of *mandamus* does not issue to justices who happen to be meeting as a matter of convenience and expressing views, but only when they are sitting in a judicial capacity.

[EDITORIAL NOTE. As a matter of practical convenience, it is obviously very desirable that persons incurring the very heavy expense of erecting a modern cinema should feel that it is reasonably certain that a licence in respect of the premises will be granted upon their completion. Statutory provision for this, however, though specially made in the case of premises for the sale of intoxicating liquors, was omitted from the Cinematograph Act, 1909, and it can only be assumed that it was purposely omitted. Any practice to effect this result, if not actually illegal, can receive no support from the court, and it is clearly wrong that county councils, or justices where such powers have been delegated to them, should fetter their future action in any way.

AS TO CINEMA LICENCES, see HALSBURY, 1st. Edn., Vol. 27, Theatres, pp. 419-421, paras. 828-832; FOR CASES see DIGEST, Vol. 42, pp. 920-922, Nos. 156-175.

Case referred to :

(1) *Laceby* v. *Lacon & Co.*, [1899] A.C. 222 ; 30 Digest 37, *293* ; 68 L.J.Q.B. 480 ; 80 L.T. 473.

APPLICATION to make absolute two rules *nisi*, for *certiorari* and *mandamus* respectively, directed to justices for the borough of Barnstaple "sitting to exercise under the Cinematograph Act, 1909, s. 5, the powers delegated to them by the Devon County Council pursuant to powers conferred on the council by the said Act in respect of matters arising within the said borough."

G. R. Blanco White, K.C., and *F. S. Laskey* showed cause for the justices.

G. D. Roberts, K.C., and *G. R. King Anningson*, in support of the rule.

LORD HEWART, L.C.J. : These are two rules *nisi* for a writ of *certiorari*, or, alternatively, a writ of *mandamus* to be directed to certain justices of the peace for the borough of Barnstaple. The matter to which the attention of the court has been invited is a matter of a somewhat peculiar kind. One cannot help observing at the outset that, whether the rule *nisi* for *certiorari* or the rule *nisi* for *mandamus* be considered, the justices A
referred to are described as justices of the peace in and for the borough of Barnstaple sitting to exercise, under the Cinematograph Act, 1909, s. 5, the powers delegated to them by the Devonshire County Council, pursuant to powers conferred upon the said county council by the said Act. It is, therefore, a matter of primary importance, logically as well as chrono- B
logically, to see what those powers are. The Cinematograph Act, 1909, s. 2 (1), provides as follows :

> A county council may grant licences to such persons as they think fit to use the premises specified in the licence for the purposes aforesaid on such terms and conditions and under such restrictions as, subject to regulations of the Secretary C
> of State, the council may by the respective licences determine.

That was the power of the county council to grant licences to use premises specified in the licence.

The power of the justices arose, as is stated in the rule, under sect. 5 of the statute. That section is in these terms : D

> Without prejudice to any other powers of delegation, whether to committees of the council or to district councils, a county council may, with or without any restrictions or conditions as they may think fit, delegate to justices sitting in petty sessions any of the powers conferred on the council by this Act.

Apparently in this part of England the powers have been so delegated E
to justices. But nothing could be delegated which is not to be found within the four corners of the statute. The county council cannot delegate to justices power to do that which the county council itself cannot do. Therefore, so far as the existing controversy is concerned, the only power which these justices have to exercise is the power to F
grant a licence to use premises specified in the licence for the purposes contemplated by the statute.

That being so, it is important to see what is the nature of the complaint. I turn again to the rule *nisi* for a writ of *certiorari*, which, *mutatis mutandis*, is in the same terms as the rule *nisi* for *mandamus*. The applicant G
desires that the justices should be directed to show cause for a certain determination by them, dated Mar. 25, 1937, refusing a certain application of one Carder for the approval of plans for converting certain premises in the borough of Barnstaple, of which he is owner, into a cinematograph theatre, which plans were, in or about the beginning of H
1936, approved by the Barnstaple urban district council and by the superintendent of police.

The fact leaps to the eye that there is not a syllable in this statute about the approval of plans. We are told from the bar—and, of course, we accept it—that there is in this part of the country a practice, said to be convenient, whereby a person, desiring ultimately to obtain a licence under the Cinematograph Act for certain premises, but not yet having erected those premises, seeks by anticipation to commit the justices to the honourable necessity of granting a licence if and when the premises shall have been constructed. It is perfectly obvious that there is, or there is believed to be, no power to grant a licence in respect of premises not yet in being. The licence which is to be granted is a licence to use the premises specified in the licence, and that means, of course, real premises. Therefore, where the premises are to be new premises, in order to avoid the difficulty and the expense of taking the risk involved, in first erecting the building and applying for a licence afterwards, this scheme has apparently been devised, whereby the justices may be asked to approve plans of a building to be constructed, and thereby honourably to commit themselves, or their successors, to an undertaking to grant the licence after the construction. Whether that course is convenient, or whether it is ingenious, are questions with which we need not concern ourselves. That in fact is what is done.

Whatever its merits may be, when, in those circumstances, the justices sit for the preliminary purpose of considering the plans, it seems to me to be quite impossible to argue—except, of course, for controversial purposes—that they are engaged in a judicial proceeding. They are engaged in an administrative proceeding, for which something may be said, and against which something undoubtedly may be said. This, for example, may immediately be said. There seem to be grave objections, from the point of view of the public interest, in taking or permitting a course by which, by securing from one body of persons express approval of certain plans of a building, it is sought to commit another body of persons to the grant of a licence after the building has been constructed. In spite of the lapse of time, and in spite of many considerations which may be relevant to the grant of a licence, the justices who are asked to grant the licence may have very strong objections to doing so. It is really a matter of academic interest to consider what may be the merits or demerits of this plan. The question is whether the justices, in sitting for the preliminary purpose of considering plans of a building not yet constructed, are engaged in a judicial proceeding such as may be brought to the notice of this court for the purpose of the prerogative of a writ of *mandamus* or of *certiorari*.

In my opinion, it is impossible to contend that the justices are so engaged. Mr. Roberts, who has urged everything that can be urged on behalf of his client, who is said to be unfortunate, though it is manifest that he is not unfortunate in all respects, has really found himself in a dilemma. Either the application which was before these justices was an application for the grant of a licence or it was not. If it was an application for the grant of a licence, it was for the grant of a licence in respect of premises not yet in being. There has been no request for such a grant, and no refusal to make it. If it was an application for the grant of a licence which was an application for the approval of plans, that was an application for something not contemplated or provided for by this statute; it was essentially an extra-judicial proceeding, in a matter not known to the law. It seems to me that this is clearly not a case either for a writ of *certiorari* or for a writ of *mandamus*.

Lastly, Mr. Roberts has very properly asked us to look beneath the form to the substance; and he has, indeed, suggested certain amended rules *nisi* which he thinks might meet the difficulties which have been raised. I need not dwell upon them. In effect, they do not meet the difficulties, and they cannot. The difficulties are too fundamental to be dealt with in that way. When one does look beneath the form to the substance, the substance appears to me to be this, that the difficulty, amounting perhaps to an impossibility, of getting a cinematograph licence for premises not yet in being has caused those who are interested to look about for a circuitous route to the same goal. Those who have to do with the granting of licences for the sale of intoxicating liquor were faced by exactly the same difficulty long ago, but the difficulty was not surmounted or evaded by an ingenious arrangement; it was surmounted by the express provisions of a statute. It seems to me that it will take the express provisions of a statute to get rid of the difficulty which lies at the root of the present trouble. However that may be, I have no doubt that, upon the materials which are before us, this is not a case for a writ either of *certiorari* or of *mandamus*, and I think that these rules ought to be discharged.

Humphreys, J.: I am of the same opinion. I desire to add a few words, because Mr. Roberts has argued before the court that the view which has been expressed by Lord Hewart, L.C.J., as to the law, and in which I entirely concur, will result in hardship, or, it may be, injustice, to the applicant for the rule.

Historically, the matter rests in this way. From before 1828 to 1874, licences for the sale of intoxicating liquor were granted, in the language of the statute of 1828, "to persons in respect of premises." In 1874, when Parliament was passing a statute primarily to amend the Act of 1872, which had consolidated most of the previous statutes, it was thought desirable to get rid of a difficulty which had arisen, a difficulty which has been referred to in this case, namely, that a licence could be granted to premises only, which meant existing premises. Accordingly, in that Act it was provided, and provided for the first time, that any person interested in any premises about to be constructed or in course of construction for the purpose of being used as a house for the sale of intoxicating liquors might apply to the justices for a provisional grant of a licence, and the justices, if satisfied with the plans of the house supplied to them, and if satisfied that, if the premises had been actually constructed in accordance with those plans, they would have granted such a licence, might make a provisional grant. That was in 1874, and that provision has been repeated throughout modern Acts of Parliament, and is the law to-day.

In 1909, Parliament was providing for that novel kind of entertainment which has come to be written, and I suppose pronounced, "cinematograph." When one looks at the statute, it appears to me to be very difficult to assume that Parliament did not intentionally leave out any provision for granting cinematograph licences by way of a provisional grant to premises about to be constructed. Parliament cannot have been unaware of the difficulties which would arise, and I think it is a fact which cannot be overlooked that Parliament, for what must be assumed to be good and sufficient reasons, decided not to make any provision in this Act comparable with the provision to which I have referred in the Act of 1874.

Mr. Blanco White, I think perfectly properly, whether his clients wished it or not, thought it right, as a member of the Bar, to draw our attention to what might be a legal difficulty. He admitted quite frankly, in answer to a question from myself, that what has been done in Barnstaple, and, he says, elsewhere, is this. Faced with the difficulty, as it seemed to them in Barnstaple, of suggesting that a licence under the Cinematograph Act can be granted to premises not in existence, there has come into operation a sort of gentleman's agreement, as it has been referred to in other matters, between the justices and the owners of premises which are, or it is hoped will become, cinematograph houses. The agreement is that, instead of applying for a licence, on the assumption (whether rightly or wrongly I do not think we are called upon to say) that a licence cannot be granted to premises not yet erected, an application is made for the sanction of plans in respect of the house proposed to be erected. Then, if the justices approve those plans, an application is made to a subsequent bench of justices at a time, which in all human probability will be at the very least six months, and more likely a year, afterwards, when the premises are built, for a licence under the terms of the Cinematograph Act. It is said that, in those circumstances, the subsequent bench of justices will feel itself bound by the decision of its brothers sitting—in what circumstances ?—sitting as justices of the peace to hear an application which, in my opinion, is an application of a kind entirely unknown to this statute, or to any other statute, and unknown to the law.

I wish to guard myself against being supposed to be saying that such a practice is illegal. I see nothing illegal in it. As to whether it is convenient or whether it is desirable, I express no opinion. What this court is asked to do is to say that justices sitting in those circumstances, and hearing and deciding such an application, are justices sitting in a capacity which enables this court to control their proceedings by *certiorari* or *mandamus*. In my opinion there is no such power. A writ of *certiorari* does not, nor does a writ of *mandamus*, go to justices who happen to be meeting as a matter of convenience and expressing views. It goes to them when they are sitting—I would use the words "as a court," but for the fact that they might be licensing justices, when they are not a court in the true sense—in a judicial capacity, under the terms of some statute.

There is one other observation which I desire to make. Mr. Roberts has asked me, and urged us with considerable force, to look in this matter at the substance, and not at the form. In regard to that argument, which is always an attractive one, I think it well to draw attention, not for the first time, to the language of the Earl of Halsbury, L.C., in *Laceby* v. *Lacon & Co.* (1). The particular passage to which I desire to refer is to be found in the opinion of the Earl of Halsbury, L.C., which was the unanimous judgment of the House of Lords. That case was a case in which it was said that the justices had done something which, on the face of it, was perfectly legal; they had granted a licence, but they had granted it in circumstances which made it in effect the removal of a licence. They had no power to do that, because the owner of the premises from which the licence was to be removed had a right of veto under the statute. That was the argument. It had found favour in the courts below; that is to say, the divisional court and the Court of Appeal. The House of Lords reversed the judgments of the other courts. In expressing his opinion in the House of Lords, the Earl of Halsbury, L.C., said, at pp. 228, 229:

> Now, I quite follow what Mr. Lawson Walton and Mr. Foote have so ingeniously and earnestly pointed out, that the result arrived at may be the same as would have been arrived at by a "removal." Granted. But what then? The thing that the magistrates have done is not the thing which is contemplated by sect. 50 [which deals with removal]; that is to say, not the same as regards the actual order. Whether it is the same thing in substance or not I will treat of in a moment, but it is not the thing.

Then, after making some other remarks, the Earl of Halsbury, L.C., returns to the question of form and substance, and says, at p. 229:

> My Lords, the observation immediately arises that where you are dealing with a subject-matter of this sort the form is part of the substance. It is a delusion to suppose that magistrates may do what may be equivalent to this, that, or the other. They are within the iron framework of a statute, and they have no jurisdiction to go beyond it.

He observes that all that they did do, and all that they intended to do, was to grant a licence to a person, which they had power to do.

In my view, it is not a matter which this court can take into consideration at all as to whether the justices were in effect granting a licence, or in effect making it impossible for their colleagues, who might be sitting at a later date, to refuse a licence. They did not grant a licence, and the reason they did not grant a licence was that nobody applied to them for a licence. For these reasons, and for the reasons expressed by Lord Hewart, L.C.J., in his judgment, I agree that these rules are asked for in circumstances in which the court has no power to grant them.

DU PARCQ, J.: I agree. As this court is refusing to consider evidence which it was proposed to adduce before it, on the ground that, whatever view it took of it, it could not make these rules absolute, and also because it was suggested at the bar that some injustice might be done to the applicant by too close an adherence to the form rather than to the
A substance, I think I ought to add a few words, in order to express my complete agreement with the order proposed.

There is no doubt that, if there is ground for saying that there was bias in this case, the court would have dealt, by *mandamus* or *certiorari*, with an order made by these justices in a matter where it was its duty
B to make that order. It is enough, for the purposes of this case, to say that this court has never interfered, and will never interfere, with something which is not an order or a determination at all, but which, putting it at its highest, is an intimation of what may happen when an application which has not yet been made is made at some later date. The jurisdic-
C tion of the justices under this Act is, as has been pointed out, strictly limited. Powers are delegated to them by the council, and the council can delegate only such powers as the council itself possesses. The power in question here is a power to grant a licence. Any applicant for a licence must give not less than seven days' notice to certain persons of his
D intention to apply for a licence.

We are told that in substance there has been a refusal to grant a licence. There are, it seems to me, many criticisms to be made of that assertion. I do not know whether it is necessary to decide definitely in this case whether or not a licence may be granted in respect of premises
E not yet built. I observe that it is a point upon which the solicitor who swore an affidavit in support of the application for these rules has no doubt himself, because, in para. 7 of his affidavit, he says this :

> As the said Act [the Cinematograph Act] makes no provision for the granting of a licence in respect of premises not yet erected, the justices for the said borough have always treated an application for approval of plans as an application for a
> F licence which is automatically granted at a subsequent date if approval to the plans is given.

Having heard the argument, I suppose we ought to read into that the further words : "which is automatically refused at a subsequent date, if it should be applied for, if approval to the plans is not given." Indeed,
G Mr. Roberts went so far as to say—and he may be right—that he thought the justices would be disposed, through their clerk, not even to accept an application for a licence.

Without saying whether these proceedings can be stigmatised as illegal, my view of the matter is that it is a proceeding which is highly
H inconvenient. I have no doubt that it is still open to the applicant here to apply for a licence. I do not say that he is entitled to apply for a licence even though his premises are not built ; I express no opinion, one way or another, upon that question. If he is entitled so to apply, and if he is so advised, let him do so ; he has not done so yet. If he is not, let him wait until the premises are complete, and then let him apply.

The proceedings which have taken place appear to me inconvenient, because I cannot help feeling that, should the same justices be sitting when the application was made, they might find their position embarrassing and unfortunate. That, however, is not a matter which it is necessary to deal with now.

One thing seems to me to be quite certain, and that is that there is A
no power in the county council, and therefore no power which could be conferred upon the justices, to give indications as to future events, and to lay it down that a licence will later automatically be granted, or that a licence in the future will certainly be refused. As a matter of fact, no application for a licence is before them. It would obviously fetter the B
hands of other persons. It seems to me to be unarguable that any body of persons exercising, I do not say judicial functions, but such functions as it is the duty of justices in these cases to exercise, can (to use a phrase which has been used during the hearing of this case) by what is called a gentleman's agreement fetter, limit, control, or in any way affect, C
their own decisions, or those of their successors, or of other justices in the future.

I think that here there is no determination by these justices with which we can deal, and I think that the applicant has taken a wrong course in coming here with these proposals. D

Rules discharged.

Solicitors: *Gibson & Weldon*, agents for *S. A. Copp*, Barnstaple (for the justices); *Torr & Co.*, agents for *Toller, Oerton & Balsdon*, Barnstaple (for the applicant).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*] E

BLEE *v.* LONDON & NORTH EASTERN RAILWAY CO.

[HOUSE OF LORDS (Lord Atkin, Lord Russell of Killowen, Lord Macmillan, Lord Maugham and Lord Roche), **October 15, 18, November 5, 1937.**] F

Workmen's Compensation—Course of employment—Commencement—Accident on way to work—Emergency work—Payment commencing from time of leaving home—Workmen's Compensation Act, 1925 (c. 84), *s.* 1 (1). G

On Jan. 21, 1935, a workman finished his ordinary day's work at 5.15 p.m., and in the normal way would have started work again at 7.20 a.m. on the following day. At 10.30 p.m. on that same evening, in accordance with his contract of service, he was called for emergency duty, and was knocked down by a motor car while crossing the street on his way to work. Later, he died from the injuries sustained. There H
was no evidence that his employers had any right to give him any orders until he arrived at the place where his services were required, but his payment for such emergency work commenced from the time he left home. His widow claimed compensation :—

HELD : there was evidence to support the arbitrator's finding that the employment commenced from the time the workman left his home, from which time his payment commenced, and that the accident arose in the course of the employment. The arbitrator had not misdirected himself in any way, and his award must stand.

Order of Court of Appeal ([1936] 3 All E.R. 286) *reversed.*

[EDITORIAL NOTE. The substantial question here is whether any differentiation is to be made between ordinary employment and emergency employment, where payment commences from the time the man leaves home. The Court of Appeal thought no distinction should be made; but the House of Lords, while not definitely deciding that the fact of payment commencing at the moment of the man's departure from home was decisive that the employment then commenced, have held that, if the arbitrator (i.e., the county court judge) so finds on the facts, that is a finding which, provided there is evidence to support it, ought not to be disturbed by a higher court. The matter, therefore, becomes one of fact for the arbitrator.

As TO COMMENCEMENT OF EMPLOYMENT, see HALSBURY, Supp., Master and Servant, para. 361; and FOR CASES, see DIGEST, Vol. 34, pp. 277-279, Nos. 2341-2357. See also WILLIS'S WORKMEN'S COMPENSATION, 30th Edn., pp. 20-32.]

Cases referred to:

(1) *Davidson* (*Charles R.*) *& Co.* v. *M'Robb or Officer*, [1918] A.C. 304; 34 Digest 276, *2339*; 87 L.J.P.C. 58; 118 L.T. 451; 10 B.W.C.C. 673.

(2) *Alderman* v. *Great Western Ry. Co.*, [1937] A.C. 454; [1937] 2 All E.R. 408; Digest Supp.; 106 L.J.K.B. 335; 156 L.T. 441.

(3) *St. Helen's Colliery Co., Ltd.* v. *Hewitson*, [1924] A.C. 59; 34 Digest 280, *2364*; 93 L.J.K.B. 177; 130 L.T. 291; 16 B.W.C.C. 230.

(4) *Newton* v. *Guest, Keen & Nettlefolds, Ltd.* (1926), 135 L.T. 386; Digest Supp.; 19 B.W.C.C. 119.

APPEAL from an order of the Court of Appeal (SLESSER and SCOTT, L.JJ., and EVE, J.), dated Oct. 20, 1936 (reported [1936] 3 All E.R. 286), setting aside an award of £300 made in favour of the appellant on May 1, 1936, by His Honour Judge MCCLEARY at the Clerkenwell county court sitting as an arbitrator under the Workmen's Compensation Act, 1925. The facts and the arguments are set out in the opinion of LORD ATKIN.

G. Justin Lynskey, K.C., and *W. Shakespeare* for the appellant.

Sir Walter Monckton, K.C., and *F. W. Beney* for the respondents.

LORD ATKIN: My Lords, this is an appeal in a workmen's compensation case from an order of the Court of Appeal, who set aside an award by the late Judge MCCLEARY, sitting at Clerkenwell, in favour of the widow of the workman. The deceased man was an acting ganger in the employ of the respondents. He was killed as the result of a street accident while proceeding to fulfil an emergency call on the railway, and the question is whether, in the circumstances, the accident arose out of and in the course of his employment. The arbitrator found that it did. The Court of Appeal thought that, as a matter of law, it did not. The facts, which were not in dispute, were that the deceased man was an acting ganger, employed by the railway company, with his headquarters at Hornsey station. He received a wage of 63*s.* a week, and his normal hours were from 7.20 a.m. to 5 p.m. It was, however, a term of his contract that outside those hours he might be ordered to come to do emergency work on the railway. If he received such an order, he had to obey it. He received overtime, varying with the time of the day or night, commencing from the time he left his home and calculated to the nearest quarter of an hour, with a minimum of two hours. On the day in question, the workman, having worked the usual A time, had retired to bed, when he received a message to go to Hornsey sidings where some trucks had been derailed. He started out at 10.30 to get to the work, and was run into by a car while on his way, receiving injuries from which he afterwards died. He never in fact reached the railway, or any part of it. B

There can be no question that, had the workman been going to his ordinary work in the morning, he would not have been entitled to compensation for injury suffered from street risks incurred in transit. His time in such a case is his own: he arrives at the scene of his labours as he pleases. And, though it is his duty to present himself at the C appointed time, yet his "employment" does not, in ordinary circumstances, begin, for the purposes of the Act, until he reaches the place where he is employed. As LORD DUNEDIN said in *Davidson (Charles R.) & Co.* v. *M'Robb or Officer* (1), at p. 321, in a passage aptly cited by my noble and learned friend LORD RUSSELL OF KILLOWEN in *Alderman* v. D *Great Western Ry. Co.* (2), at p. 459:

> In my view "in the course of employment" is a different thing from "during the period of employment." It connotes, to my mind, the idea that the workman or servant is doing something which is part of his service to his employer or master. No doubt it need not be actual work, but it must, I think, be work, or the natural incidents connected with the class of work. . . E

LORD ATKINSON, in *St. Helens Colliery Co., Ltd.* v. *Hewitson* (3), puts it, at p. 71:

> A workman is acting in the course of his employment . . . when he is doing something in discharge of a duty to his employer, directly or indirectly, imposed upon him by his contract of service.

In *Newton* v. *Guest, Keen & Nettlefolds, Ltd.* (4), at p. 126, VISCOUNT F CAVE, L.C., accepting the test laid down in *Hewitson's* case (3), determines the case by consideration of the fact:

> that when the accident happened he was on his way to his work by the means provided by his employers but was in no sense actually engaged in the performance of his contract of service. G

Finally, I would refer to the words of LORD RUSSELL OF KILLOWEN in *Alderman's* case (2), at p. 461:

> The cases in which men are employed to work at a distance from their homes and have to find lodgings for themselves must be innumerable. Yet there is no case in the books, or at all events none was cited, in which such an one meeting with an accident when merely on his way to or from his work has been held entitled H to compensation. In order to entitle him to compensation in such a case some other element must be present (involving the discharge of a contractual duty to the employer) which in law extends the course of his employment so as to include the moment of time when the accident occurred.

In the present case, if the course of the employment had begun, there was no dispute that the injury by street risk was an injury by accident arising out of the employment. The messenger-boy, the postman, the canvasser, employed to travel on the streets, and injured, in the course of the employment, by an ordinary street risk, are entitled to compensation, and none the less so because they are exposed to the risk in no higher degree than the ordinary wayfarer. The question is whether the employment had begun in the sense of the decisions I have cited. The respondents say that this is the ordinary case of a man making his way to his work. It matters not what the particular hours are. Normally, he would have to present himself at 7.20 a.m. On emergency, he has to present himself also at 8 p.m., 10 p.m., or whatever the emergency time may be. The contractual position remains the same. The employment does not begin until he has reached his work. On the other hand, the appellant says that, whatever be the true result in other cases, in this case there was evidence upon which the judge could find that the workman was "doing something that was part of his service to his employer"; something "in discharge of a duty to his employer directly imposed upon him by his contract of service"; was "actually engaged in the performance of his contract of service"; was engaged "in the discharge of a contractual duty to the employer." In my opinion, the case is not free from doubt, but I have come to the conclusion that there were special facts in this case, in the special duty to obey the emergency call at any hour, and the fact that the workman was paid from the time he left the house, so that the time was his master's time, and he was under an obligation to proceed with reasonable despatch, by the reasonably shortest route, which afforded evidence from which the judge could infer that, from the time the workman started from his house, he was "actually engaged in the performance of his contract of service." It does not appear that the arbitrator, the late Judge McCLEARY, in any way misdirected himself, and, as there was evidence to support his finding, I think that it should stand. This decision has no general application to cases where workmen are employed to work at hours which differ from their normal hours of labour, though they are discontinuous. Any such case must be decided on its own facts. I move your Lordships that the order appealed from be reversed, that the award of the arbitrator be restored, and that the appellant have the costs in the Court of Appeal, and in this House.

LORD RUSSELL OF KILLOWEN: My Lords, I have had an opportunity of reading and considering the opinion which has just been delivered from the Woolsack, and also the opinion of my noble and learned friend LORD MAUGHAM. I agree with them, and have nothing to add.

LORD MACMILLAN: I also have had the same advantage as my noble and learned friend LORD RUSSELL OF KILLOWEN, and I concur.

LORD MAUGHAM: My Lords, I have had the advantage of reading the opinion which my learned and noble friend LORD ATKIN has just expressed, and I fully agree with his conclusion, and the reasons he has given in support of it. The respect which I entertain for the Lords Justices has led me to endeavour to express, very shortly, in my own language, the grounds on which, in a difficult case, I have felt constrained to differ from the judgments which were delivered in the Court of Appeal.

My Lords, the facts found or admitted at the hearing of the arbitration are not in dispute. The question to be determined is simply this: Were the facts such that the arbitrator could properly find, as he did, that the employment of the workman began when he left his home on the evening of Jan. 25, 1935? On the whole, and after full consideration of the reasons given in the Court of Appeal in answering this question in the negative, I feel constrained to come to an opposite conclusion. The employment of the workman on the occasion of the accident was on emergency work. There was no evidence as to its precise nature, and it might, of course, have been work of great urgency and importance. The fact that the payment of the workman was calculated from the time when he left home is not, I think, alone a sufficient reason for holding that his employment began at that time; but, in the case of an emergency call, it is, I think, a sufficient ground for taking the view that he was bound, as from the moment when he left his house, to proceed with all reasonable expedition, by the nearest available route, to the place to which he had been summoned. We can test the view of the arbitrator by supposing that a superior officer of the company happened to meet the workman loitering on his way to the place, or diverging from the proper route. Could not the officer properly have ordered the workman to proceed direct to the place to which he had been called? The circumstance as to payment affords, I think, a decisive answer in the affirmative. The case of a workman going to his ordinary daily work is plainly quite different.

My Lords, I think the arbitrator in the particular circumstances was justified in coming to the conclusion that the workman's time, after he left his home at 10.30 p.m., was not "his own," or, in other words, that he was not, after that moment, to use another popular phrase, "his own master." The finding of the arbitrator cannot, therefore, be disturbed, and his award should be restored, with the consequences already mentioned.

LORD ROCHE: My Lords, I agree that this appeal should be allowed. There is little that I desire to add, as I am in entire agreement with the reasons for that conclusion stated by my noble and learned friends LORD ATKIN and LORD MAUGHAM.

A workman may be acting in the course of his employment, or, put more shortly, he may be on duty, when in a public street. Ordinarily, he is not so acting when proceeding to the place where his work proper begins. But he may be so acting if he is proceeding to that place by a route or by a means of conveyance prescribed by his employer. The circumstances here are different, in that neither route nor conveyance was prescribed. But, when Blee was summoned from his bed, and was directed to proceed, in his employer's time, for which he was paid, to Hornsey sidings, he was, in my opinion, bound so to proceed with all possible speed, by the shortest possible route. His time was not his own. A servant carrying a message for his employer through the public streets may be on duty, or in the course of his employment, whilst so doing. He is usually under no control exercised immediately, but ordinarily he owes a duty to his employer as to the manner in which he proceeds. He is on duty. Similarly, in this case, the special circumstances to which I have referred constitute, as I think, evidence to support a conclusion that the workman was on duty at the time of the accident. Accordingly, I am of opinion that there was evidence which in law entitled the county court judge to find that the accident arose out of and in the course of the workman's employment.

Appeal allowed and award of arbitrator restored, with costs.

Solicitors : *Pattinson & Brewer* (for the appellant) ; *I. B. Pritchard* (for the respondents).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

AUSTINS OF EAST HAM, LTD. *v.* INLAND REVENUE COMMISSIONERS.

[KING'S BENCH DIVISION (Lawrence, J.), **October 13, 14, 15, 29, 1937.**]

Income Tax — Company — Voluntary liquidation — Undistributed profits—Accounts not made up to time of liquidation—Liability for sur-tax—Finance Act, 1922 (*c.* 17), *s.* 21—*Finance Act,* 1927 (*c.* 10), *s.* 31.

The appellant company, the accounts of which had been made up to Mar. 31, 1934, entered into negotiations for the sale of its business. The company went into voluntary liquidation on Apr. 30, 1935, without having distributed its profits for 1934-1935. The liquidator then sold the business of the company, as at Mar. 31, 1934, to a new company, and the accounts for the year to Mar. 31, 1935, were not prepared until after the sale had been completed. The special commissioners directed that the profits shown for the year 1934-1935 should be deemed to be the income of the members of the company for the purposes of sur-tax. The company appealed :—

HELD : (i) in the event of a liquidation, the words in the Finance Act, 1927, s. 31, relate to any period for which accounts have not in fact been made up, and the special commissioners were entitled to consider the period 1934-1935.

(ii) although it might have been reasonable to retain the profits in the business, had there been no liquidation, the fact of liquidation in this case made it no longer reasonable or possible to retain profits for the requirements of the business.

[EDITORIAL NOTE. It was attempted in this case to restrict the operation of the Finance Act, 1927, s. 31 (4), to broken periods of accounting—being usually parts of a year intervening between the end of the period of the last account and the date of the liquidation ; but that contention is rejected, and the profits of the whole previous year for which the accounts are, or should have been, made up are within the terms of the section. The case also states clearly that, while profits may be retained in a going concern to meet its requirements, such retention of profits becomes impossible upon a decision to wind up being taken.

As to Undistributed Profits and Liquidation, see HALSBURY, Hailsham Edn., Vol. 17, pp. 293, 294, para. 580 ; and for Cases, see DIGEST, Supp., Income Tax, Nos. 674 *g*-674 *t*.]

Cases referred to :

(1) *Inland Revenue Commissioners* v. *Burrell*, [1924] 2 K.B. 52 ; 28 Digest 108, *665* ; 93 L.J.K.B. 709 ; 131 L.T. 727 ; 9 Tax Cas. 27.

(2) *Glazed Kid, Ltd.* v. *Inland Revenue Commissioners* (1930), 15 Tax Cas. 445 ; Digest Supp.

Case stated by the Board of Referees, pursuant to the Finance Act, 1922, s. 21.

The facts and arguments in the case are fully stated in the judgment.

Paras. 16 and 19 of the case stated, to which reference is made in the judgment, are as follow :

> 16. We further held that where the only reason put forward for not making a larger distribution than was in fact made is that the company had agreed to sell its assets on terms which either deprived it temporarily of liquid resources, or made it a breach of contract, or otherwise illegal to make a larger distribution, then, unless the company proves that it could not have effected the sale on equally favourable terms, not involving obstacles to a distribution by way of dividend, we are not precluded from holding that the company has not distributed a reasonable part of the income for the period in the manner referred to in sect. 21.
>
> 19. We further found as a fact, in view of the absence of any evidence by the company, that if the declaration of a dividend would have been a breach of contract or otherwise illegal, it was unreasonable for the company to deprive itself of the right legally to distribute a dividend to its ordinary shareholders. It could have made no difference to the purchaser if any balance at the bank had been excluded from the sale and the purchase price reduced accordingly, or if the company had been permitted to borrow for the purpose of distributing a dividend, and the liability dealt with in the same way as the possible liability to sur-tax was dealt with in cls. 6 and 7 of the second schedule to the agreement of Apr. 24, 1935.

The Finance Act, 1927, s. 31 (4), provides as follows:

> (4) Where an order has been made or a resolution passed for the winding-up of a company to which the said sect. 21 applies, the income of the company for the period from the end of the last year or other period for which accounts of the company have been made up to the date of the order or resolution for winding up shall, for the purposes of the said section, be deemed to be income of that period available for distribution to the members of the company, and, as respects that period and the next preceding year or other preceding period or periods ending within that next preceding year for which accounts have been made up, the said section shall apply as if the words " within a reasonable time " in subsect. (1) of the said section were omitted therefrom.

Sir Stafford Cripps, K.C., and *Michael E. Rowe* for the appellants.

The Attorney-General (*Sir Donald Somervell, K.C.*), *J. H. Stamp*, and *Reginald P. Hills* for the respondents.

Lawrence, J. : This is an appeal from a decision of the Board of Referees restoring a direction of the special commissioners that, for the purposes of the assessment of sur-tax, the actual income of the appellant company from all sources for the year ending Mar. 31, 1935, should be deemed to be the income of the members thereof, and should be apportioned among them.

The appellant company is a company to which the Finance Act, 1922, s. 21, as amended by the Finance Act, 1927, s. 31, applies, and has since 1907 carried on business as a manufacturer of builders' joinery. Its accounts were made up to Mar. 31, 1934, and during the ensuing year negotiations were carried on between its directors and a Sir William Dunn for the sale of its business. On Apr. 24, 1935, before the accounts for the year to Mar. 31, 1935, were made up, an agreement was reached between the appellants' directors and shareholders and Sir William Dunn, whereby the directors and shareholders undertook that the company should go into liquidation on Apr. 30, 1935, without distributing its profits for the year 1934-35, that the liquidator should sell the business of the company as at Mar. 31, 1934, to a new company, to be formed with the same name as the old company, for a sum in cash and shares, and that completion should take place on May 3, 1935. These arrangements were carried out, and accounts for the year to Mar. 31, 1935, were not prepared and submitted to the new company until June, 1935. In these circumstances, the special commissioners have directed that the profits shown in these accounts for the year 1934-1935 shall be deemed to be the income of the members of the old company for purposes of sur-tax. In the case stated, it is found as a fact that the profits of the old company for the year 1934-1935 were retained in the business for the current requirements of the company, and it was admitted that, if the old company had not gone into liquidation, the commissioners would not have attempted to support the direction.

The argument before me on behalf of the appellant company was, in the first instance, that sect. 21 was inapplicable, because the accounts had not in fact been made up before liquidation; that sect. 31 applied only to broken accounting periods, *e.g.*, Mar. 31, 1935, to June, 1935; that the agreement of Apr. 24, 1935, prevented the old company from declaring a dividend; that a liquidator cannot distribute income; and that the Board of Referees were wrong in throwing upon the old company the onus of showing that they could not have effected the sale of the business on equally favourable terms without precluding themselves from distributing the profits of the year 1934-1935, and in holding that it was unreasonable for the old company to deprive themselves of the right to distribute such profits. Reliance was placed on *Inland Revenue Commissioners* v. *Burrell* (1) and *Glazed Kid, Ltd.* v. *Inland Revenue Commissioners* (2).

The Attorney-General contended (i) that a contractual obligation not to distribute profits does not preclude a direction under sect. 21, unless that obligation was necessary for the current requirements or maintenance or development of the company; (ii) that the obligation was not undertaken by the company, but by the shareholders; (iii) that it was the liquidation, and not the contract, which prevented the distribution, since the contract applied only up to May 3, 1935; and (iv) that sect. 31 applies in all cases of liquidation, and entitled the commissioners to disregard the liquidation for the purposes of a direction under sect. 21, and to deal with all the profits since the accounts were last made up, namely, since Mar. 31, 1934.

In reply, Sir Stafford Cripps abandoned his argument that sect. 21 did not apply because the accounts had not been made up, and contended that the words "for which accounts have been made up" refer to the accounting period, and not to the fact of making up the accounts, and that sect. 31 has reference to broken accounting periods only, and therefore did not entitle the commissioners to consider the period Mar. 31, 1934, to Mar. 31, 1935, in the present case.

I am unable to accept Sir Stafford Cripps' argument. In my opinion, the words of sect. 31 in their ordinary meaning relate, in the event of liquidation, to any period for which accounts have not in fact been made up, and did entitle the commissioners to consider the period Mar. 31, 1934, to Mar. 31, 1935.

It is true that the Board of Referees have given for their decision certain reasons with which I am unable to agree, namely, in paras. 16 and 19, and I do not think that this ought to deter me from supporting a direction of the commissioners, which, in my view, was justified by sect. 21, as amended by sect. 31. It may be said, and was said by Sir Stafford Cripps, that, as the profits for the period 1934-1935 were properly retained at the time for the current requirements of the company, it cannot be right to hold that it was unreasonable not to distribute them, but the circumstance of liquidation, in my opinion, entirely alters the case. It may be perfectly reasonable for the owner of a business to retain profits in the business for its requirements, but, if he sells the business for cash, he ceases to do so, and it was this consideration which, in my view, must have moved the legislature to enact sect. 31, and so enable the commissioners to consider the financial position of shareholders in companies to which the section applies in the altered light of liquidation. In this connection, I may refer to the words of sect. 31 (1), which contemplate that sums which are to be regarded as income may already have been applied to the current requirements of the company.

In any event, the words of sect. 31 appear to me to be clear, and to apply to the present case, and I therefore dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors: *Kenneth Brown, Baker, Baker* (for the appellants); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

SCOPHONY, LTD. *v.* TRAUB AND OTHERS.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Romer and MacKinnon, L.JJ.), **October 29, 1937.**]

Equity—Quia timet *action—Attempted bribery of employees—Attempts unsuccessful—Right to injunction.*

The manager of the defendant companies endeavoured by dishonest means to procure for his companies information to which they had no right whatever. He had attempted to secure this information from employees of the plaintiff company, but the attempts were unsuccessful. These employees were under stringent service agreements, prohibiting them from disclosing confidential matters. The plaintiffs and defendants were interested in television, and the plaintiffs were a research company, going through the preparatory stages in order to perfect and render commercial a method of television which had not yet reached a commercial stage. The disclosure of the information to the defendants would have caused the plaintiffs irreparable damage. The plaintiffs prepared a draft letter complaining of these matters, which was shown to the defendants, and the latter promised that the attempts should cease; but whatever was done proved quite ineffective to stop such attempts. The plaintiffs then issued the writ in this action asking for an injunction to restrain the defendants and their servants and agents from making such attempts:—

HELD: (i) it being proved that the defendants through their manager were wrongfully endeavouring to persuade employees of the plaintiffs to disclose information, and that such disclosure would cause irreparable damage to the plaintiffs, the latter were entitled to the injunction asked for, although such attempts had been wholly unsuccessful.

(ii) the plaintiffs were not under any duty to take any further steps before issuing the writ in this action.

(iii) it was no answer to the claim for an injunction that the manager who made the attempts was now employed by the defendants in a different capacity. The important fact was that he was still in their employment.

[**EDITORIAL NOTE.** In the court below, the defendants had successfully argued that, since the attempts to seduce the employees from their allegiance had proved unsuccessful, there was no imminent danger of an infringement of the legal rights of the plaintiff company. The Court of Appeal have, however, decided that in such a case the danger is sufficiently imminent to warrant the granting of an injunction, since more attractive propositions might be placed before these employees, or other employees might prove to be persons of weaker stuff and yield to the temptation placed before them.

AS TO *Quia Timet* ACTIONS, see HALSBURY, Hailsham Edn., Vol. 13, pp. 62, 63, paras. 55-57; and FOR CASES, see DIGEST, Vol. 20, pp. 548-551, Nos. 2703-2722.]

APPEAL by the plaintiffs from a decision of FARWELL, J., given on June 17, 1937. The facts are set out in the judgment of SIR WILFRID GREENE, M.R.

The following extract from the judgment in the court below shows the reasons for the decision there.

FARWELL, J.: Now, I have to consider what are the legal rights of the parties in those circumstances. As I have said, I am satisfied that Traub, acting on behalf of the company, has taken steps that he

was not entitled to take, and has acted illegally in the sense that he endeavoured wrongfully to get from the plaintiff company's employees information that he was not entitled to get. I have to bear in mind—and this is the important factor in this case—that this is a *quia timet* action. I should add that there is no allegation in the statement of claim that the defendant company is threatening and A
intending to repeat the acts of which complaint is made, or that the repetition of such acts will result in serious damage to the plaintiff. In my judgment, such an allegation in the statement of claim is imperative, in a case of this kind. Without such an allegation, the action could not succeed. Tested in this way, if the defendant company had put in no B
defence, and this action had come on on a motion for judgment as a short cause, in the absence of that allegation it is quite plain that this court could have granted no relief whatever. Mr. Shelley, on behalf of the plaintiff company, realising that difficulty, when it was pointed out, has formally asked for leave to amend his statement of claim, by C
making that necessary allegation. For the moment, we may assume that the allegation is in the statement of claim by amendment. But it is said, on behalf of the defendant company, that a *quia timet* action will not lie at all in any case of this kind. I have been referred to a long line of authorities which is said to establish the proposition, and I have D
no doubt those authorities do establish the proposition, that, in the case of a person who endeavours to get an employee of another to commit a breach of contract, it is essential to prove damage; and damage is the gist of such an action, and, without damage, there is no cause of action. That, I think, is undoubtedly the law, but, in my judgment, that in no E
way prevents this court from exercising the equitable jurisdiction which it has to prevent a wrong being committed before it is done. That is to say that, in my judgment, in a case of this kind, a *quia timet* action will lie, and this court will, in a proper case, restrain the defendant from doing an act if the doing of that act is shown to be imminent, and is one F
which will result in serious damage to the plaintiff. I am quite satisfied that there are analogous cases which show that that is so. Passing-off actions, and other actions of that kind, in my judgment, make it plain that, although the action is one in which the whole gist of the action is damages, and the right to relief is damages, none the less this court is G
not prevented from intervening, and by injunction preventing from being done that which, if done, might do irreparable damage to the plaintiff company.

It is quite obvious that in the case of some trade secret, or some particularly valuable method of manufacture, the disclosure of which might do H
to the plaintiffs damage for which no sum of money could properly compensate them, it would be a denial of justice if the court should refuse an application to prevent the disclosure of such secret knowledge, provided it were shown that there was a real danger of such knowledge being disclosed, and that it would result in damage. Therefore, I am not troubled,

in my judgment, in this case, with the proposition that was argued by Mr. Vos, that this action will not lie at all, that the plaintiff company cannot get relief in this action. But I am troubled with this aspect of the case, that, since damage is of the essence of an action of this kind, in order to succeed in a *quia timet* action it must be shown that, not only A is there danger of the acts complained of being done, but also the result of the acts complained of will lead to damage. It is not enough for the plaintiff to say that what has happened in the past indicates that it *will* happen again in the future, unless he can go further and say that the court can properly infer, from what has happened, that it will not B only occur again, but that it will also lead to serious damage.

In my judgment, that is where the plaintiff company fails in this action. The evidence shows that the plaintiff company has the great fortune to have loyal employees. Those who have been approached have refused the temptation offered to them; they have not fallen to the C voice of the tempter, and have declined to disclose any secret information. I have no reason to suppose that an approach by Mr. Traub, in the future, to any other employee of the plaintiff company will have any more result than what has happened before. Unless there is *some* evidence that there is a real danger that that which Traub has done not D only will be repeated but also will lead to serious damage, I cannot assist the plaintiff in this case. I am asked really to leave out one step in that which is necessary for the plaintiff to prove. Not only is it necessary for him to prove that there is a likelihood—a real possibility —of Traub repeating what he has already done—and that I think will E not be very difficult—but also, secondly, that there is a real likelihood of his succeeding in what he is seeking to do, and, thirdly, that that will result in damage. Again, in regard to damage, I do not think it would be difficult, in the circumstances, to infer that, if Traub's efforts were successful, it would result in damage to the plaintiff. But, as I have F said, I cannot see any grounds, or any evidence at all, which would lead me to suppose, in this case, that the efforts which have not been successful in the past will be any more successful in the future, and, unless there is a real risk of damage in the future, there is no cause of action, and the plaintiff company cannot succeed.

G *K. E. Shelley, K.C.*, and *Stuart Bevan* for the appellants.

Philip Vos, K.C., and *Wilfrid Hunt* for the respondents.

SIR WILFRID GREENE, M.R.: The plaintiffs are a company incorporated in the year 1935 as successors to a company which previously H existed, and their business at present consists in research and inventive work in connection with television. They are going through the preparatory stages, with a view to discovering and perfecting, so as to render it a commercial matter, a method of television which at present has not reached the commercial stage. The two defendant companies are interested also in television. The second of them is a company which is itself engaged in research with a view to subsequent exploitation of any invention it may perfect. The first defendant company is a selling company, which will sell the products of the second defendant company, if and when those products are ready in a commercial sense. Mr. Ernest H. Traub, the first defendant, is, or was at the relevant time, the responsible manager of both companies, and there is no contest of the A proposition that, in respect of the matters of complaint in this action, he was acting as a servant of the defendant companies, and they are responsible on ordinary principles for his actions. The work in which both the research companies are engaged is work of novelty, which requires and demands a high degree of competence on the part of their B employees. It is sufficient to say that it is not disputed (Mr. Vos in terms admitted it) that the employees of the plaintiff company whose names are concerned in these events were in possession of information the disclosure of which to the defendants would cause the plaintiffs irreparable damage. We therefore start off with the position that the C servants of the plaintiffs are persons in possession of information of that character. The three servants whose names have come into the story were under stringent service agreements, prohibiting them from disclosing confidential matters. Mr. Traub, being in the position which I have described, has apparently thought it consistent with honesty to D endeavour to seduce certain employees of the plaintiffs from their trust. I will give the details of that in a moment. The object of this action is to obtain an injunction to restrain the defendants from procuring or endeavouring to procure the employees of the plaintiffs to commit a breach of their contracts, or to disclose confidential information. The E action is a *quia timet* action, because fortunately the operations of Mr. Traub met with no success, the employees whom he perfidiously attempted to seduce being honest men, and resisting those temptations.

The history of the matter can be stated quite shortly. It begins in 1935, the year of the incorporation of the plaintiff company, when Mr. F Sagall, the managing director of that company, became aware of the fact that Mr. Traub was apparently conducting a campaign of worrying and soliciting its servants. That came to a head in July, and the plaintiffs, after having taken advice, proceeded to draft a letter. That letter was in fact never delivered, for reasons which I will explain in a G moment, but it is worth just looking at its terms. It was dated July 12, 1935. It is addressed to both defendant companies, and it says this :

> Dear Sirs, It is with great regret that we have to draw your attention to the fact that responsible members of your organisation have in the past tried to enlist and make use of the services of members of our technical staff, for work and/or advice on behalf of either International Television, Ltd., and/or Messrs. I.M.K. Syndicate, H Ltd., without the consent or knowledge of Scophony, Ltd. You will appreciate that we are bound to take a very serious view of such a matter. At the same time —while reserving the right to take at any later stage any action that we may consider necessary in order to safeguard and protect the interests of the company—we express the hope that you will take immediate steps to prevent the recurrence of any incidents which may give us cause for complaint. It is only in this way that friendly relations in the interest of future co-operation could be preserved between our respective companies.

That letter, as I have said, was never posted, but it was shown to Sir Henry White-Smith, the head of the defendants' board, and another director, in an interview which Mr. Sagall, of the plaintiff company, had with them. At that interview, Mr. Sagall explained to them what was happening. He read the letter to them, and they, appreciating the seriousness of what was disclosed, gave assurances that it should be stopped. The judge has found that Sir Henry White-Smith and Mr. Cary, the other director of the defendant companies, were perfectly honest in this matter, and I doubt it not. It would appear that the steps, whatever they may have been, which they took to prevent this sort of thing happening in the future were quite ineffective. I do not attribute that, and there is no suggestion that that is to be attributed, to any lack of goodwill on their part, but, whatever the reason may be, whether it be due to an excessive belief in the fundamental honesty of human nature or not, the result was that the steps which they took in regard to Mr. Traub proved completely ineffective to stop the operations of that gentleman, because in Dec., 1936, an incident occurred in reference to one Dodington, a young employee of the company, who was approached by Traub, and not merely that incident, but also another in connection with another employee called Jeffree. I need not go into the details of those attempts of Mr. Traub dishonestly to seduce these employees from their allegiance, because it is not suggested by Mr. Vos that the judge's findings in those respects are open to challenge, but it is quite obvious that Mr. Traub, in the case of these two employees at least, was endeavouring by dishonest and treacherous means to procure for his companies information to which they had no right whatsoever. The whole transaction reeks of dishonesty and treachery, and it is difficult to find words strong enough to characterise the nature of the propositions which Mr. Traub thought fit to put forward. Those were the things which were established at the trial to the satisfaction of the judge. It is perfectly true that those efforts were unsuccessful. Fortunately for the plaintiffs that is so, but, on discovering what Traub had done in the matter of Dodington and Jeffree, the plaintiffs not unnaturally proceeded, without further ado, to issue a writ. I myself cannot agree with the view that, before issuing that writ, they ought to have taken some further steps. The steps which they had taken in the past had proved to be completely ineffective, not due to any lack of honourable conduct on the part of the gentlemen whom they had approached, but due to the fact that those gentlemen had not produced any efficient solution of the difficulty, and whatever they had done in respect of Mr. Traub had proved quite useless for the purpose of curbing his activities. The plaintiffs issued their writ, and I for one am not surprised that they took that step without making any further effort to get the directors of the defendant companies to do something about it. When one appreciates that one success on the part of Traub, dealing, I think, in both cases, with comparatively young men whom he attempted to bribe, might have caused irreparable injury to the plaintiffs, I think myself, with all respect to the judge, who, I think, was disposed to take a contrary view, that the plaintiffs did not act in the least unreasonably, in view of the history of this case, in starting proceedings when they did. The action, of course, is, as I have said, a *quia timet* action, and the threatened wrong complained of is one in which damage forms the gist of the action. Down to the present, no damage has come from it, because Traub's efforts have been unsuccessful, but a *quia timet* action will lie, and an injunction will be granted to restrain the apprehended damage in such cases if a sufficient case is made out. If those acts are continued, and are successful, the damage that will follow will admittedly be irreparable. That there was a very strong probability of their being repeated was, I think, at the time quite clear, in view of the past history of Mr. Traub and of the position which he held, and which he is permitted still to occupy, in the defendants' companies. What was said, and this argument found favour with the judge, was this : As it must be established to the satisfaction of the court that there is an imminent risk of damage, the plaintiffs failed to establish that, because they failed to satisfy the court, not as to the damage which will result if Traub is successful, but that there is a reasonable probability, or an imminent probability, of Traub succeeding in seducing employees of the plaintiff company from their honesty and their faith. With the greatest deference to the judge, I cannot accept that view. It was argued with great strenuousness by Mr. Vos that there was no evidence, no scintilla of evidence, that the plaintiffs had any other employees who might have in their possession knowledge of facts and details the disclosure of which would injure the plaintiffs. It was argued that the fact that Mr. Traub had failed in the past was sufficient to show that he would fail in the future, and the judge, I think, accepted that argument to this extent, that he took the view that the integrity of these employees, and indeed (by inference) of other employees of the plaintiffs, had been sufficiently tested, and had been shown to be proof against temptations of this kind. With all deference, I am unable to accept that view. It appears to me that, once it is established, (*a*) that the defendants through their servant Traub have been endeavouring wrongfully to persuade employees of the plaintiffs to disclose information of a confidential nature, and (*b*) that the disclosure of that information will cause irreparable damage to the plaintiffs, it is not right to draw the inference that those attempts will be no more successful in the future than they have been in the past. The plaintiffs are entitled to be protected against the risk of attempts of that kind succeeding. Three of the employees have been approached. Those approaches have been unsuccessful. Other employees may be engaged tomorrow, or the approaches which have been made in the past may be accompanied by further and greater temptations ; and when I say this it involves no suggestion on my part that any of these gentlemen would be liable to succumb to a temptation, however much money was offered to them; but that so far as this court is concerned is neither here nor there. Different temptations may be offered to these or to different persons, and I am quite unable to accept the view that, because a particular temptation, addressed to particular persons in the past, has failed of its object, therefore the plaintiffs are to be left at the risk of having those, and similar, and perhaps more compelling, temptations dangled before their employees in the future. It appears to me that there are present in this case all the elements essential to give the court the duty to grant an injunction to restrain actions of this kind. The nature of the present situation is, I think, illustrated very strongly by this circumstance, that, in spite of his record, Mr. Traub is retained in the employment of the defendant companies. I am not going to say a word to criticise the action of the people who, perhaps with every desire to give a man a chance to retrieve his mistakes and misdeeds of the past, keep him in their employment. It is a different kind of employment, but he is still there. That is neither here nor there. What is of importance is that, if they keep him in their employment, the plaintiffs are entitled to have, in my judgment, that protection against the sort of activity of which he has been guilty in the past which they claim here. It is no answer, as Mr. Vos suggested, to the plaintiffs' claim to say that Mr. Traub's occupation is now different, and not so responsible as it was when he was guilty of these actions. In my opinion, the appeal succeeds, and the plaintiffs are entitled to relief in the shape of the appropriate injunction.

ROMER, L.J.: I entirely agree. It was said by Mr. Vos, and said truly, that, in order to enable a plaintiff to succeed in a *quia timet* action, he must show that the danger of infringement of his legal rights is imminent, and that he must further show that, if those legal rights be infringed, the damage sustained by the plaintiff will be irreparable. Now, it is perfectly plain in the present case that, if the defendants succeed in extracting from any employee of the plaintiffs secret information, the damage sustained by the plaintiffs will be irreparable. I think it is equally plain that, at the time the writ in this case was issued, the danger of further infringement of the plaintiffs' rights was imminent. It is true that the three employees of the plaintiffs who have so far been approached by Mr. Traub have been sufficiently loyal and honest to resist the temptation that he placed before them, but there may be, now or in the future, in the employment of the plaintiffs people of weaker stuff, and before any one of them Mr. Traub might very easily, and very probably will, or would unless an injunction is granted, place propositions so attractive from a pecuniary point of view that, under the influence of Mr. Traub's hospitality and his persuasive tongue, they might yield to the temptation placed before them. I think the danger was real and imminent at the time the writ in this action was issued. Then it is said that, in order to succeed in this action, the plaintiffs ought to have approached the defendants before issuing the writ. I confess, with all respect to the judge, that I do not understand why the circumstance that they did not communicate with the defendants before issuing the writ should in any way deprive them of their right to an injunction, although in certain cases omission to communicate with the defendant before the issue of the writ may have a bearing upon the question of A costs. In my opinion, in the present case there was no obligation of any sort or kind on the plaintiffs to communicate further with the defendants before issuing the writ in this action. In the first place, the earlier communication made to the defendants through their directors in 1935 had proved to be insufficient to prevent a repetition of the infringement B of their legal rights which they had sustained at that time. But, in the next place, any such letter might well have resulted in the occurrence of that irreparable damage to the plaintiffs which it was their object to avoid. Had they written a letter to the defendants before issuing this writ, Mr. Traub, who was the manager of the two defendant companies, C might, and probably would, have become acquainted with the contents of that letter, with the result, I imagine, from what I know of Mr. Traub, that a luncheon party, say, already arranged for the following week, would have been accelerated by several days. In my opinion, on the facts of this case, the plaintiffs are entitled to the injunction they seek. D Therefore, I agree that this appeal should be allowed.

MacKinnon, L.J.: I agree.

Appeal allowed with costs.

Solicitors: *Albert Fletcher & Co.* (for the appellants); *Hill, Dickinson* E *& Co.* (for the respondents).

[*Reported by* Reginald Townsend, Esq., *Barrister-at-Law.*]

F

BARNES (INSPECTOR OF TAXES) *v.* HELY HUTCHINSON.

[King's Bench Division (Lawrence, J.), **October 15, 18, 1937.**]

Income Tax—Double taxation—Relief—Shares in English company held by Indian company—Dividends of English company suffering tax—Relief to preference shareholder in Indian company. G

The respondent was a preference shareholder in an Indian company. The Indian company was a shareholder in two English companies, the profits of each of which had suffered taxation. The dividends received by the Indian company from the two English companies formed 44.12 per cent. of the total profits of the Indian company, and the respondent contended that he was to be treated as having borne 44.12 per cent. H of the tax upon the dividends received from the Indian company:—

Held: notwithstanding the fact that the tax upon dividends from foreign companies depends upon Sched. D, case V, and Misc. Rules, r. 1, the principle against double taxation applies to foreign companies so as to exempt shareholders in foreign companies from suffering double taxation. The respondent was, therefore, entitled to relief from taxation upon his dividends to the extent of 44.12 per cent. thereof.

[EDITORIAL NOTE. The present case would seem to extend the principle in *Gilbertson* v. *Fergusson* (1) in two ways. That case applied, in the circumstances here considered, the principle of double taxation relief to ordinary shares, and it is here held that the principle also applies to preference shares. In that case, also, the company who suffered the tax was the company paying the dividends, whereas here the English companies had suffered the tax, but it was an Indian company which subsequently paid the dividends to the person assessed.

As to *Gilbertson* v. *Fergusson* Relief, see HALSBURY, Hailsham Edn., Vol. 17 p. 195, para. 399; and for Case, see DIGEST, Vol. 28, p. 79, No. 431.]

Cases referred to:

(1) *Gilbertson* v. *Fergusson* (1881), 7 Q.B.D. 562; 28 Digest 79, *431*; 46 L.T. 10; 1 Tax Cas. 501.

(2) *Neumann* v. *Inland Revenue Commissioners*, [1934] A.C. 215; Digest Supp.; 103 L.J.K.B. 210; 150 L.T. 481; 18 Tax Cas. 332.

Case stated by the commissioners for the general purposes of the Income Tax Acts pursuant to the provisions of the Income Tax Act, 1918, s. 149, for the opinion of the High Court.

The respondent is the beneficial owner of 525 preference shares of Rs. 1,000 each in George Henderson & Co., Ltd., a company registered in Calcutta. These preference shares are entitled to a fixed cumulative dividend at the rate of 8 per cent. per annum. In addition to its preference capital, the company also has issued ordinary share capital. The company is the beneficial owner of a large number of ordinary shares in two companies registered in England, the Barnagore Jute Factory Co., Ltd., and the Hunwal Tea Co., Ltd. The whole of the profits of these British companies are assessed to United Kingdom income tax. During the year ending Apr. 5, 1931, the company received upon its ordinary shares in the British companies dividends amounting in Indian money to Rs. 1,15,143. These dividends were paid out of profits of the British companies which had borne United Kingdom income tax, and such tax was deducted by the British companies from the dividends in question. These dividends were employed by the company, together with the other income, which had not borne United Kingdom income tax, for the purpose of paying a dividend of 8 per cent. upon the preference shares of the company. It was agreed at the hearing that 44.12 per cent. of this preference dividend was paid by the company out of the taxed dividends received from the British companies. This dividend upon the preference shares of the company was paid in full, without any deduction for income tax, on June 22, 1931, and the respondent received, as and for the dividend due to him, the sum of Rs. 42,000. This dividend was paid by the company by means of dividend warrants sent direct to the shareholders, without the intervention of any paying agents. Included in the assessment appealed against was the full amount of the dividend so received by the respondent. It was contended on behalf of the respondent that such part of the dividend as was paid out of profits and gains which had already borne United Kingdom income tax—viz., 44.12 per cent.—could not again be subjected to the same tax, and that the assessment should be reduced accordingly. It was contended on behalf of the appellant, *inter alia*, that: (*a*) the assessment did not involve double taxation, in that the respondent and the company were respectively chargeable as separate entities in respect of separate sources of income; (*b*) the relief in *Gilbertson* v. *Fergusson* (1) was given on equitable grounds, and that such grounds did not exist in the present case, where the income assessed was in respect of a fixed preference, as contrasted with an ordinary, dividend; (*c*) there was no reason in law or in equity why a preference shareholder in a foreign company should not suffer taxation on the full amount of the preference dividend he received, since a preference shareholder in an English company would suffer taxation by deduction at the source; (*d*) the present case was distinguishable from *Gilbertson* v. *Fergusson* (1) by reason of the fact that in that case the company paying the dividends was the same as the company the English profits of which had already been taxed, whereas, in the present case, there was the interposition of the Indian company having no direct trading connection with this country, and the profits of which had not been directly assessed to United Kingdom income tax. The commissioners held that they were bound by the decision in *Gilbertson* v. *Fergusson* (1), and that the appeal must be allowed as regards such part of the dividend as was paid out of profits and gains which had already borne United Kingdom income tax.

The Attorney-General (*Sir Donald Somervell, K.C.*,) and *Reginald P. Hills* for the appellant.

Roland Burrows, K.C., and *Terence Donovan* for the respondent.

Lawrence, J.: In spite of the able arguments which have been addressed to me on behalf of the Crown, I think that, on the authorities as they stand, the decision of the commissioners was right. The respondent is a preference shareholder in an Indian company, and that Indian company is the shareholder in two English companies. The profits of those English companies have suffered taxation. The question which I have to decide is whether the respondent can get the benefit of a proportion of the tax which has been paid by those English companies.

The dividends which the Indian company receives from the two English companies form 44.12 per cent. of the total profits of the Indian company, and the respondent contends, and the commissioners have held, that he is to be treated as having borne 44.12 per cent. of the tax upon the dividends which he actually receives from the Indian company. That view has been adopted by the commissioners, basing themselves upon the authority of *Gilbertson* v. *Fergusson* (1), which was decided a long while ago. That was the case of the Imperial Ottoman Bank, which had an English agency in London which conducted a banking business in London and made profits in England. It was there held that the English committee which acted as paying agent to English shareholders in the Imperial Ottoman Bank was entitled to the benefit of the tax paid upon the English profits, in the proportion that those profits bore to the total profits of the Imperial Ottoman Bank. The commissioners have held that that case is applicable to the present case. The contention for the English agency, the Imperial Ottoman Bank, in that case was that, as the profits of the English agency were sufficient to pay the dividends payable in England, those dividends ought to be paid without any further tax being paid upon them ; but the court held that that was not so, but that those dividends were bound to suffer taxation in the proportion which the English profits bore to the total profits of the Imperial Ottoman Bank.

The Attorney-General and Mr. Hills have contended that that case is at any rate not decisive of the present case, and really throws no light upon the present case, (i) because the point actually decided as to the proportion was conceded by the Crown ; (ii) because in that case they were dealing with ordinary shareholders who suffer the taxation, as the Attorney-General and Mr. Hills contended, directly and alone as opposed to a preference shareholder, whose preference dividend, if it is paid to him in full, suffers no part of the taxation ; and (iii) because the judgments in that case, in dealing with the question of double taxation, say that the principle against double taxation applies where it is the same person who suffers the tax, and that there it was the Ottoman Bank which suffered the tax and which was assessed, whereas here it is not the respondent who suffered the tax, but the English companies. Lastly, it is contended for the Crown that, in any event, in this case the connection between the respondent and the company who has paid the tax is too remote, and that, whereas, in the case of English companies, the tax is assessed upon the company, in the case of the Imperial Ottoman Bank, referred to in *Gilbertson* v. *Fergusson* (1), it was assessed upon the agency, and in the present case it is assessed, there being no agency, upon the particular shareholder, namely, the respondent. Reliance was placed, on behalf of the respondent, not only upon *Gilbertson* v. *Fergusson* (1), but also upon the principle which has been enunciated in *Neumann* v. *Inland Revenue Commissioners* (2) in the House of Lords, by which decision it has been held that, where the profits of a company have suffered income tax, those profits should not suffer further income tax in the hands of the company's shareholders. The Crown contend that that principle is applicable only to English companies, by reason of the provisions of the Income Tax Acts which deal with English companies, and that no such principle applies to foreign companies.

In my opinion, the case of *Gilbertson* v. *Fergusson* (1) shows that a similar principle is applicable to foreign companies, and that, notwithstanding the fact that the tax upon dividends from foreign companies depends upon Sched. D, case V and Misc. Rules, r. 1, the principle against double taxation applies in the case of foreign companies so as to exempt shareholders in foreign companies from suffering double taxation. I can see no reason for distinguishing between a foreign company which pays its dividends through a paying agent and one which pays them direct to the shareholders; nor can I see any difference between a preference shareholder and an ordinary shareholder. The ordinary shareholder may be said, in one sense, to suffer the tax more directly than does the preference shareholder, but the preference shareholder feels the burden of the tax as well, and the principle which underlies *Neumann's* case (2) (a principle which appears to me to have been the governing principle for the decision in *Gilbertson* v. *Fergusson* (1)) shows that it is not necessary that the individual shareholder should actually bear the whole burden of the tax. It is sufficient if the profits out of which the dividends are paid have suffered tax. That is the principle of *Neumann's* case (2). In this present case, the profits of the Indian company, George Henderson & Co., Ltd., in so far as they consist of the profits of the two English companies, have suffered English income tax just as the profits of the Imperial Ottoman Bank English agency had suffered English income tax, and, therefore, in the proportion that the said profits bear to the total profits of George Henderson & Co., Ltd., I am of opinion that the respondent, the individual shareholder in George Henderson & Co., Ltd., is entitled to relief from taxation upon his dividends.

For these reasons, I am of opinion that the decision of the commissioners was right, and the appeal will be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellant); *Sanderson, Lee & Co.* (for the respondent).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS *v.* GULL.

[KING'S BENCH DIVISION (Lawrence, J.), **October 21, 22, 29, 1937.**]

Income Tax—Exemptions—Charity—Charity established in United Kingdom—One trustee so resident.

A testator gave the balance of his property in England and Russia to establish a charitable home in Ontario. The testator was domiciled in Ontario, and the will was proved in 1925 by one executor in England and by another in Ontario. In 1925 the Canada Trust Co. was by order of the court in Ontario appointed a trustee of the will in place of the Canadian executor. On Nov. 30 the English executor paid over to the Canada Trust Co. £50,000 and received an indemnity and release therefor, but, as he was unable to obtain a release and indemnity in respect of the balance of the English and Russian estate in his hands, he retained the same. The income of this balance was assessed to English income tax, and the trustee claimed exemption therefor, as being the income of a charity:—

HELD: (i) the exemption of charities applies only to the income of bodies of persons or trusts established in the United Kingdom.

(ii) as two of the original trustees had been resident in the United Kingdom and one still was so resident, the trust was established in the United Kingdom, and the exemption applied.

[EDITORIAL NOTE. This case limits the exemption of charities to charitable trusts established in the United Kingdom. It seems, however, that it is sufficient that there is one trustee of the charitable trust resident in England and in control of A some part of the property; for it is to be noted that the trustee herein was anxious to pass the property to the Canadian trustee, if he could obtain a satisfactory release. The will appointed two persons resident in England and one in Canada as executors.

As to Exemption of Charities, see HALSBURY, Hailsham Edn., Vol. 17, pp. 310-314, paras. 617-621; and for Cases, see DIGEST, Vol. 28, pp. 82-84, Nos. 469-483.]

B

Cases referred to:

(1) *Morice* v. *Durham* (*Bp.*) (1805), 10 Ves. 522; 43 Digest 582, *305*.

(2) *Colquhoun* v. *Heddon* (1890), 25 Q.B.D. 129; 28 Digest 92, *546*; 59 L.J.Q.B. 465; 62 L.T. 853; 2 Tax Cas. 621.

(3) *Re Robinson, Besant* v. *German Reich*, [1931] 2 Ch. 122; Digest Supp.; C 100 L.J. Ch. 321; 145 L.T. 254.

Case stated by the commissioners for the special purposes of the Income Tax Acts pursuant to the Finance Act, 1925, s. 19, and the Income Tax Act, 1918, s. 149, for the opinion of the High Court.

By his will the testator directed the payment of his debts, funeral D and testamentary expenses, and gave a legacy of £400. The will further provided as follows:

> I give devise and bequeath the balance of my estate and property in England and Russia unto my executors and trustees hereinafter named in trust to sell and convert the same into money and to remit or send the proceeds thereof to my executor in Canada whom I direct to use and apply such proceeds towards public E charity as he may select and deem advisable preference being given to the maintenance and support of a home or homes for poor children in the city of London, Ontario, Canada, and if he sees fit for the erection of a home for such children such funds to be used as a memorial to my deceased wife Lucinda Macgarvey and I give devise and bequeath my estate and property both real and personal in Canada and in the United States of America unto my executors and trustees hereinafter named in trust to sell and convert the same into money and to use and apply the F proceeds thereof towards public charity as he may select and deem advisable preference being given to the maintenance and support of a home or homes for poor children in the city of London, Ontario, and if he see fit and deem advisable for the erection of a home for such children as aforesaid . . . and I nominate and appoint my friend Alexander W. Kerly of 10 and 11, Austin Friars, London, England, solicitor and Walter Gull of the same place secretary public company and Thomas W. Scandrett of the city of London in the province of Ontario, Canada, solicitor to be executors and trustees of this my last will and testament.

G

The testator died on Jan. 10, 1925, domiciled in the province of Ontario, and his will was proved in England on Aug. 7, 1925, by Gull. Kerly renounced probate on Jan. 20, 1927. The will was proved in Canada on June 18, 1925, by Scandrett. Estate duty on the testator's estate H in England was paid on Aug. 7, 1925. On June 4, 1932, an order was made by the Supreme Court of Ontario appointing the Canada Trust Co. a trustee in the place of Scandrett. On Nov. 30, 1932, Gull paid to the Canada Trust Co. the sum of £50,000 under the terms of the will, and obtained therefor a release and indemnity. Gull was unable to obtain a release and indemnity in respect of the balance of the English and Russian estate in his hands, and retained the same. The claim is made in respect of income from investments representing the testator's English and Russian estate received by Gull. It was given in evidence by a practising member of the Bar in Ontario that the funds representing the testator's estate were impressed with a trust for charitable purposes under the law of Ontario ; that the Mortmain and Charitable Uses Act, **A** 1927 (Revised Statutes of Ontario, c. 135), s. 1 (2), provides as charitable uses within the meaning of the Act, " (*a*) the relief of poverty, (*b*) education, (*c*) the advancement of religion, and (*d*) any purpose beneficial to the community not falling under the foregoing heads " ; that the law of Ontario applicable to trusts of this kind is substantially the same **B** as that in England. It was contended on behalf of the respondent that the income in respect of which the claim was made was applicable and applied to charitable purposes only within the meaning of the Income Tax Act, 1918, s. 37 (1) (*b*). It was contended on behalf of the appellants, (*a*) that the trust for charitable purposes created by the will was established **C** in Canada and both the beneficiaries and the trustee of the trust were in Canada ; (*b*) that Gull was not a trustee of any trust for charitable purposes established by the will, nor was any trust for charitable purposes in the United Kingdom established by the will, and the only duty or obligation attaching to Gull as executor and trustee of the will was to **D** realise and remit the proceeds of the testator's English and Russian property to the trustee in Canada ; and (*c*) that the income received by Gull as trustee under the will was not exempt under the Income Tax Act, 1918, s. 37.

The Solicitor-General (*Sir Terence O'Connor, K.C.*,) and *Reginald P.* **E** *Hills* for the appellants.

Raymond Needham, K.C., and *J. S. Scrimgeour* for the respondent.

LAWRENCE, J. : This is an appeal by the Crown from a decision of the commissioners that the income received in England by Mr. Walter **F** Gull, one of the executors and trustees of the will of the late Mr. Macgarvey, is exempt from income tax in pursuance of the Income Tax Act, 1918, s. 37, as being income of a body of persons or trust established for charitable purposes only. It has been held by the commissioners, and is conceded by the Crown, that the purposes to which the testator's **G** estate is to be devoted are charitable according to the law of England, but it is contended that there is no body of persons or trust established in the United Kingdom, and that therefore sect. 37 has no application.

Reliance was placed by the Solicitor-General on the history of sect. 37 (see No. VI and sect. 105 of the Act of 1842), upon the maxim *noscitur* **H** *ex sociis*, and upon the cases of *Morice* v. *Durham* (*Bp.*) (1), at p. 539, and *Colquhoun* v. *Heddon* (2), at p. 625, and it was argued that, even if *Re Robinson*, *Besant* v. *German Reich* (3) was rightly decided, a charitable trust, though upheld as such, may still not come within the exemption of sect. 37.

Finally, it was contended that the Finance Act, 1923, s. 21, the Finance Act, 1924, s. 32, the Finance Act, 1925, s. 21, and the Finance Act, 1926, s. 23, which confer exemption on the income of " a body of persons or trust established in the Irish Free State for charitable purposes only," are legislative interpretations of sect. 37 which are conclusive in favour of the Crown. Apart from the statutes above-cited, which relate to the Irish Free State, I should have thought that the true interpretation of sect. 37 was that it applied to the United Kingdom income of all charitable trusts which were valid and enforceable according to English law. In view of these statutes, however, I feel constrained to hold that the exemption applies only to the income of bodies of persons or trusts established in the United Kingdom. The question, however, remains whether the Macgarvey Trust is established in the United Kingdom within the meaning of the exemption. Two of the original trustees were resident in the United Kingdom, one of them, the respondent, still is, and the claim to exemption is made by him in respect of income of the trust received by him in the United Kingdom.

In these circumstances, I hold that the trust is established in the United Kingdom, and that the exemption applies to income received in the United Kingdom by the trustees. The appeal will therefore be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellants); *Kerly, Sons & Karuth* (for the respondent).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

GOLDSCHMIDT *v.* CONSTABLE & CO.

[COURT OF APPEAL (Greer, Slesser and Scott, L.JJ.), **October 12, 14, 1937.**]

Practice—Particulars—Libel action—Justification—Particulars of justification —Whether before or after discovery—R.S.C., Ord. 19, *rr.* 4, 27.

In a libel action where justification was pleaded as a defence, an application for particulars of justification was ordered to be stood over until after discovery:—

HELD: this was not a proper practice. Full particulars of justification should be given when the defence in a libel action is delivered.

[**EDITORIAL NOTE.** This is an attempt by the defendant in a libel action, who pleads justification, to defer giving particulars thereof until after discovery. The court were clear that this could not be allowed.

AS TO PARTICULARS OF JUSTIFICATION, see HALSBURY, Hailsham Edn., Vol. 20, pp. 455, 456, para. 556; and FOR CASES, see DIGEST, Vol. 32, pp. 99-101, Nos. 1308-1318. See YEARLY SUPREME COURT PRACTICE, 1938, pp. 304-306.]

Cases referred to:

(1) *Zierenberg* v. *Labouchere*, [1893] 2 Q.B. 183; 32 Digest 99, *1310*; 63 L.J.Q.B. 89; 69 L.T. 172.

(2) *Yorkshire Provident Life Assurance Co.* v. *Gilbert & Rivington*, [1895] 2 Q.B. 148; Digest, Pleading, 207, *1740*; 64 L.J.Q.B. 578; 72 L.T. 445.

(3) *Arnold & Butler* v. *Bottomley*, [1908] 2 K.B. 151; Digest, Pleading, 190, *1615*; 77 L.J.K.B. 584; 98 L.T. 777.

(4) *Utrillo* v. *Manson and Waterlow* (1937), *Times* Newsp., June 8.

Appeal from an order of du Parcq, J., dated July 20, 1937. The plaintiff alleged that he had been libelled in certain passages in a book published by the first defendants, written by the second defendant, and printed by the third defendants. The defendants pleaded, *inter alia*, justification as a defence, and delivered certain particulars of justification. Master Ball ordered part of these particulars to be struck out, and ordered further sets of particulars to be given at various stages in the action. On appeal, du Parcq, J., varied the master's order, and made an order that the application should stand over until after discovery. The plaintiff appealed to the Court of Appeal.

Valentine Holmes for the appellant.

G. O. Slade for the respondents Constable & Co., Ltd.

C. N. Shawcross for the respondent Coulson.

Holmes: The particulars at present given are too vague. They are not specific, and do not relate to the plaintiff personally. All the particulars should be given before discovery. [Counsel referred to *Zierenberg* v. *Labouchère* (1), *Yorkshire Provident Life Assurance Co.* v. *Gilbert & Rivington* (2), and *Arnold & Butler* v. *Bottomley* (3).]

Slade: There is no general rule of law or of practice that one must give particulars of justification. [Counsel referred to *Utrillo* v. *Manson and Waterlow* (4).] Particulars cannot be struck out merely because they repeat the libel of which complaint was made.

Greer, L.J.: The only question of principle involved in this case is whether a judge is entitled to make an order in a libel action that an application for particulars of justification should stand over until after discovery. I am satisfied by the argument of Mr. Holmes that in a libel action the party who alleges that the defamatory statements are true must make out his case on the information which he had in his possession at the time when the defence was delivered. He is not entitled to wait for discovery in order to complete his attack, but must give full particulars before discovery. I do not propose to go through the various parts of the order made by the judge. The result of that order would be inevitable confusion, which would be embarrassing to both parties.

In my judgment, the proper order to make in this case is that full particulars of the allegations in the defence be given by the defendants. This appeal must be allowed, and the order of the judge reversed.

Slesser and Scott, L.JJ., concurred.

Solicitors: *Herbert Oppenheimer, Nathan, Vandyk & Mackay* (for the appellant); *Waterhouse & Co.* (for the respondent, Constable & Co.); *Beaumont & Son* (for the respondent, Coulson); *Scatliffs* (for the respondent, Mackay).

[*Reported by* E. Fuller Briscoe, Esq., *Barrister-at-Law.*]

MOLINS *v.* INDUSTRIAL MACHINERY CO., LTD.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Romer and MacKinnon, L.JJ.), **July 19, 21, 22, 23, 27, 28, October 29, 1937.**]

Patent—Infringement—Validity—Prior publication—Problem before earlier inventor—Amendment—Original claim framed in good faith and with reasonable skill and knowledge—Damages—Back damages—Patents and Designs Acts, 1907-1932, *s.* 23.

The plaintiffs were the owners of letters patent relating to a cigarette-making machine, the feature of which was that it had slanting vanes which ensured that the shower of tobacco falling upon the paper should not have a vertical movement, but should have a component of motion in the direction in which the paper was moving. The advantage of the machine was that it avoided an uneven distribution of the tobacco in the cigarettes, and by its use the speed of production was markedly increased. There was, however, a German patent of 1880, in the specification of which there was a drawing of a similar arrangement of vanes, and the arrangement was described, but its purpose was not described, nor was it claimed that such an arrangement had the effect of increasing the speed of production of a perfect cigarette. The machine shown in the 1880 specification worked at a much lower speed than did that of the plaintiffs. An application was made, in an infringement action, to amend the specification by limiting the invention claimed to machines capable of moving at a high speed, thereby excluding the earlier invention :—

HELD : (i) without the proposed amendment, the patent in suit was invalid by reason of anticipation by the earlier patent.

(ii) the amendments sought were such as would distinguish the invention from the earlier one without enlarging its scope, and were such as might be allowed within the Patents and Designs Acts, 1907-1932, s. 22.

(iii) the patent as amended was valid.

(iv) the claim as originally framed had been framed in good faith and with reasonable skill and knowledge. Therefore, although the patent was invalid at the time when it was infringed, damages could be awarded in respect of such infringements.

Order of FARWELL, J., [1936] 3 All E.R. 709, *varied.*

British Thomson-Houston Co., Ltd. v. *Metropolitan-Vickers Electrical Co., Ltd.* (1) commented on.

[**EDITORIAL NOTE.** The Court of Appeal have come to the conclusion that the patent here in suit was anticipated, but they have allowed an amendment and, upon the ground that the original claim was framed with reasonable skill and knowledge and in good faith, have found that the plaintiff is entitled to recover damages for infringements, although it was invalid at the time it was infringed.

AS TO EFFECT OF AMENDMENT ON RECOVERY OF DAMAGES, see HALSBURY, Hailsham Edn., Vol. 24, p. 711, para. 1326 ; and FOR CASES, see DIGEST, Vol. 36, p. 824, Nos. 3080, 3081.]

Case referred to :

(1) *British Thomson-Houston Co., Ltd.* v. *Metropolitan-Vickers Electrical Co., Ltd.* (1928), 45 R.P.C. 1 ; Digest Supp. ; *on appeal from* 42 R.P.C. 143.

APPEAL from a decision of FARWELL, J., given on Nov. 13, 1936, and reported in [1936] 3 All E.R. 709, where the facts are fully stated.

W. Trevor Watson, K.C., and *James Mould* for the appellants.

Lionel F. Heald, K.C., and *G. H. Lloyd-Jacob* for the respondents.

Sir Wilfrid Greene, M.R.: I will deal with the specification first of all in its unamended form. The opening passages are as follows:

> This invention relates to cigarette-making machines of the continuous rod type wherein tobacco is fed from a hopper into a trough having a travelling band or web of cigarette paper arranged to move relatively thereto, and has for its object the provision of means for improving the consistency of the cigarette rod produced upon such machines running at high speeds. In cigarette-making machines of the above type, the tobacco is showered vertically into the trough of the machine, and it will be understood that where the same meets a web of paper running at a high speed there is a tendency for variations to occur in the density of the rod, due to the vertically falling tobacco suddenly assuming a horizontal movement. The present invention consists of a cigarette-making machine of the continuous rod type wherein the tobacco showered into the trough of the machine is given a movement in the direction of the movement of the cigarette rod, prior to the same engaging with the said band or web of cigarette paper.

It appears from these passages that the object of the invention is to remedy a defect which manifests itself at what is described as high speeds, but no indication is given as to what the patentee regards as a high speed, unless it be a speed at which the tendency for variations to occur manifests itself. Quite apart from the fact that, as I have said, the defect will be present in embryo at whatever speed the machines run, it is obvious that the speed at which the machine must run before the defect becomes one calling for a practical remedy must depend on a variety of circumstances. One manufacturer may aim at a nearer approach to perfection than another; different qualities of cigarette may differ in the desired uniformity of their filling; the sizes of cigarettes may vary. But these circumstances cannot alter the fact that the defect was a real and serious one. The difficulty of defining what the patentee meant by high speed would obviously make it desirable for him, if he could, to claim his invention in the broadest possible way, without endeavouring to limit it by reference to the speed of the machine. I can see no reason why he should not frame his claim in such a broad way, provided he could do so without encountering any of the usual objections to the validity of a patent, and, in my opinion, upon the true construction of the claims in this patent, that is exactly what the patentee has tried to do.

The claims are five in number. They are all apparatus claims, but, apart from saying that no infringement of claim 2 is proved, it is not necessary, for the purposes of this judgment, to deal with any of the claims except claim 1. That claim is as follows:

> A cigarette-making machine of the continuous rod type wherein the tobacco showered into the trough of the machine is given a movement in the direction of movement of the cigarette rod prior to the same engaging with the band or web of cigarette paper.

Now, the first thing to do is, of course, to construe this claim, and it must be construed without reference to any document relied upon as an anticipation. It is quite illegitimate to construe a claim with an eye to avoiding the effect of a prior document. Any such document must, for this purpose, be disregarded. Now, when this claim is read according to its ordinary language, it is a claim which covers every cigarette-

making machine of the continuous rod type, irrespective of the speed at which the band or web runs, or is capable of running. It covers machines both fast and slow, high speed and low speed. Every person who made a machine of the continuous rod type, in which the showered tobacco was given a movement in the direction of the cigarette rod prior to the
A tobacco engaging with the band or web, would infringe, whether his machine was capable of producing, or did, in fact, produce, 100 or 1,000 or 2,000 cigarettes a minute. Indeed, it is exactly a claim of this kind that, as I have said, the patentee would normally wish to make, if he could, since, by framing his claim in this matter, he avoids the risk of
B having his invention used without infringement by any persons careful to avoid complying with expressed limitations as to the speed of the machine.

But it is said that, upon its true construction, the claim must be read in a more limited sense, in order to give effect to what is stated to be the
C sole object of the invention, namely, to remedy a defect which appears only at "high speeds." In other words, it is said that there must be imported into the claim words limiting it to cases of what are called high-speed machines, that is to say, machines capable of running at a high speed. That such a phrase, if it had appeared in the claim, might have
D been exposed to attack on the ground of ambiguity is, I think, apparent, but I need not deal with that. It is sufficient for me to say that, in my opinion, there is no justification whatever for importing into the claim —drawn, as it is, in simple and direct language—a limitation extracted either from the language of the body of the specification or from the
E purpose at which the invention is aiming. It has frequently been laid down that this method of construing a patent specification is inadmissible. In support of his proposition, counsel for the appellants relied upon *British Thomson-Houston Co., Ltd.* v. *Metropolitan-Vickers Electrical Co., Ltd.* (1), and he claimed that this case laid down some rule of construction
F by reason of which it was legitimate to place a strained construction upon the language of the claim, so as to make it cover the declared object of the invention, and cover that object only. In my opinion, that case lays down no such rule. It is settled beyond possibility of question that the rules governing the construction of a patent specification are
G the same as those governing written documents in general. The fact that the subject-matter with which patent specifications deal is often difficult and complicated affords no ground for departing from this principle. In the *Metropolitan-Vickers* case (1), the construction placed by the House of Lords upon Rosenberg's first claim—and it is upon this
H that the argument in the present case is based—was arrived at upon the particular language of the claim, which was interpreted as relating to the particular arrangements described in the specification and drawings. The contrary suggestion, that the claim extended to every arrangement where two machines are put in series, was negatived, not because the House thought it legitimate to strain the language of the claim by

importing limitations derived from the body of the specification, but because the language of the claim of itself imported a reference to arrangements of a particular kind, made for a particular purpose. In my opinion, no assistance can be derived from that case in the construction of the claim now in question.

I have dealt with the true construction of this claim without any reference to the result of so construing it. If I am right, the claim includes every cigarette-making machine in which a component of movement in the direction of the travelling band or web is imparted to the shower of tobacco, at whatever speed the machine runs, or is capable of running. If the claim, as so construed, covers a machine which is the subject-matter of an earlier patent, it is necessarily void. In the present case, there is such an earlier patent, and it is not disputed that, if claim 1 is construed in the way in which I have construed it, the existence of that earlier patent is fatal to its validity. The patent in question is a German one, Patent No. 14,203 of Bonsack, whose machine was one of the earliest cigarette-making machines brought into practical use. This machine, so far as regards the general principles of its working, and leaving aside for a moment the question of the component of movement in the direction of the travelling band, was in all essential matters the same in principle as that with which we are now concerned, although there are differences in mechanical detail. According to the evidence, this machine, by its design, could run at a rate of not more than 250 cigarettes a minute, and the evidence of persons who used it when it was first constructed confirms this. The important matter is that, in the drawings, and according to the directions contained in the body of the specification itself, the trough into which the showered tobacco descends is to be inclined downwards in the direction of the movement of the travelling belt, with the result that a component of movement in the direction of the belt is imparted to the showered tobacco. It follows that a machine constructed in accordance with this specification would infringe the present claim 1.

But here there is put forward an argument which I have some difficulty in following. It appears to be of this nature. Bonsack's specification does not explain for what purpose in the construction of his machine the trough is to be inclined. Various hypotheses as to Bonsack's reasons were put forward by the expert witnesses, but I do not find it necessary or profitable to engage in speculations of this kind. It is said, as I follow the argument, that Bonsack's patent cannot be an anticipation, because it does not appear, and ought not to be assumed, that, in giving directions for the inclination of his trough, he was envisaging the same problem as that with which the present inventor was concerned; and that, if the problems were not the same, the validity of the present claim is not affected by the fact that this particular element is to be found inserted for no apparent purpose in Bonsack's machine. In support of this argument, reliance is again placed upon the *Metropolitan-Vickers* case (1).

It is said that, if the question formulated by LORD DUNEDIN, at p. 22, be asked in the present case, the answer given would be the same as that given by LORD DUNEDIN in that case. Now, in my opinion, there is current some misunderstanding with regard to the meaning of the language used in that case, and I think it desirable to make a brief examination of it. The patent then in suit (Rosenberg's patent) was concerned with the starting of synchronous automatic electric machines. In the starting of machines of this character, of the size in use at the date of the patent, it was essential to ensure that the synchronous machine should be speeded up so as to enable it to receive the supply current without the detrimental results which follow when that current is received at a time when there is not perfect synchronisation between it and the machine. The method previously used had been to start the machine by means of a starting-motor, to speed it up to a proper speed, and then to connect it with the supply, an operation which, if not carried out with exactitude, led to disastrous results. Rosenberg had the idea of arranging the starting-motor and the synchronous machine in series, and of connecting electrically the motor winding with the armature of the synchronous machine, with the result that, when the machine attained the desired speed, it would already be in synchronism, thus avoiding a special synchronising operation. The patent which was relied upon as an anticipation was Tesla's patent, and for present purposes it is sufficient to consider fig. 5 in his specification, at p. 151 of the report. That figure shows the starting motor "T" and the synchronous machine "S." Live wires are shown from a source of alternating current, and the two motors are shown as placed in series. The arrangement of the live wires is such that, by means of a switch "P^1", the current is prevented from passing through the synchronous machine when the switch is closed, but, when the switch is open, it passes through the synchronous machine, which then operates in series with the starter motor. Tesla's instructions with regard to this machine are to be found on p. 153 of the same report beginning at line 2. The first instruction he gives is to close the switch "P^1" so that the whole current passes through the starting-motor (or, as he describes it, the torque motor) alone. He then says that, when the desired speed is reached, switch "P^1" is opened, so that the current passes through both motors. Now, it will be observed that Tesla's instructions, if carried out, would afford no help in solving Rosenberg's problem. But it was said that, as Tesla had illustrated a piece of apparatus which, if the switch "P^1" were always kept open, would involve the running of a starting-motor and a synchronous machine in series from the moment when the current was switched on, it was an anticipation of Rosenberg's patent. But it is to be noticed that the real nature of Tesla's machine, regarded as a piece of apparatus, could not be considered without reference to the particular adjustment made in it at any given time, and what that adjustment should be could be ascertained only by examining Tesla's instructions as to when, and for what purpose, it was to be made. If this were done, Tesla's machine, when adjusted by the opening or closing of the switch, as the case might be, was in every true sense of the word a machine different from Rosenberg's. Accordingly, when LORD DUNEDIN puts the question, " Would a man who was grappling with Rosenberg's problem without having seen Rosenberg's patent and who had Tesla's specification in his hand have said: 'That gives me what I wish ?' " and answers it by saying, " I do not think he would," his language must be construed in relation to the facts with which he was dealing. Tesla's machine, according to its true nature, which, as I have already said, can be ascertained only by adjusting it in accordance with Tesla's directions, was not a machine which solved Rosenberg's problem, and this, in my judgment, is the true explanation of this much-quoted observation. It has, in my opinion, no application to the present case, because Bonsack's instruction is to make a machine of a particular kind. No question of adjustment arises. The inclination which he gives to his trough is a physical fact necessarily present in every machine made in accordance with his specification, and is as much a part of the true nature of that machine as is any other element in it.

I now turn to the question of amendment. In approaching this question, there are certain considerations which must be borne in mind. I am satisfied that the invention was a meritorious one, and that it provided a remedy for a known defect. The reason, and, in my judgment, the only reason, for the invalidity of claim 1 lies in the fact that it was anticipated by Bonsack. Had it not been for this, the claim would have been a valid one, notwithstanding the fact that it would have covered cases in which the defect did not show itself in any manner productive of commercial detriment. The claim would, I think, clearly have had patent utility. Further, I do not think that this ought to be treated as a case where a patentee has designedly made a wide claim of doubtful validity, and worded the language of his specification with a view to enabling him to say, if necessity arose, that the claim must be read subject to some limitation, to be gathered from the body of the specification. I see no reason for thinking that the specification was not drawn *bona fide* in this respect; it is the mere existence of Bonsack's patent that is fatal to it. The case, therefore, would appear to be one in which a proper amendment, which would avoid Bonsack and would not alter the nature of the invention nor extend the claim, should be allowed. Such an amendment would be a disclaimer within the meaning of sect. 22 of the Patents Act.

The amendment originally asked for by the appellants consisted of the insertion, in the first paragraph above-quoted from the body of the specification, after the words " arranged to move ", of the words " at a high speed (i.e., equivalent to about 900 cigarettes per minute or more)." After the words " relatively thereto," the words "hereinafter called the type described" are to be inserted, and in claims 1, 2 and 6, the words " of the type described " are to be substituted for the words " continuous rod type." The judge, as I understand his judgment, construed this amendment as confining the invention and the claim to the case of a machine which can operate only at a speed of 900 cigarettes a minute or above, and found, upon the evidence, that no such type of machine existed. He accordingly disallowed the amendment. With great respect to the judge, I am unable to agree with this construction. It appears to me that the language, as amended, upon its true construction specifies a machine capable of working at the speed indicated, whether or not it is in fact run at that speed, or is capable of running at a lower speed. I do not read the amendment as committing the patentee to the proposition that a machine of the kind contemplated is a type commercially known and recognised as a type. The words " hereinafter called the type described " are, I think, merely convenient shorthand, inserted to avoid repetition. Further, I consider that the words " arranged to move at a high speed," taken in the context, particularly in view of the words " running at high speeds " at the end of the paragraph, do not, on their true construction, mean that the machine must be so adjusted that it is incapable of running at a lower speed, or that the invention is claimed only in respect of machines when running at or above the speed mentioned. The words " arranged to move," in my opinion, mean " capable of moving," but, as they are not very happily chosen, it was suggested, and I am prepared to accede to the suggestion, that the words " capable of moving " should be substituted for them. A further modification of the language was suggested, and I see no objection to it, namely, the substitution of the words " more than 900 cigarettes per minute " for the words " about 900 cigarettes per minute or more."

If the specification is amended in this way, there can, in my opinion, be no suggestion that it is anticipated by Bonsack. A cigarette-making machine capable of running at a rate of 900 cigarettes a minute or more is a different machine from Bonsack's, since, as I have already indicated, Bonsack's machine could not run at anything approaching that speed. A machine running at a speed of 900 cigarettes or more suffered, according to the evidence, from the defect of lack of uniformity, the cure of which was the problem to which Molins was addressing himself, and I do not think it in any case legitimate to treat the inclination of Bonsack's trough as designed to cure this problem. It is true that, by fixing his limit at 900 cigarettes a minute, the inventor may be losing some protection which a more elaborately-worded claim might have given him, but I cannot see that this circumstance affords any real ground for objecting to the amendment. The amendment is attacked on several grounds. First of all, it is said that the description of the machine in the specification as amended purports to be the description of a type of machine, and that there is no such type. I have already dealt with this in discussing the views of Farwell, J., on the subject. Then it is said that the introduction of the words which specify the speed of the machine has the effect of making the invention different from that originally described. With all respect, I cannot follow this argument. That the defect appears in a practical form in machines running at what may commercially be called high speed is unquestionable. It is also unquestionable that the invention provides a remedy for this defect. A The invention is the same whenever it is applied to a machine in the running of which the defect manifests itself, and, although the inventor, as I have said, could have drafted his amendment in a more elaborate way, he has preferred to take the short cut of specifying a particular speed. For machines running below this speed he makes no claim. It B is perfectly true that, for commercial purposes, the defect may be disregarded by manufacturers running their machines at or about the specified speed, since the standard of uniformity required will vary according to the aim of individual manufacturers. Similarly, a manufacturer who is particularly careful, or wishes to produce a particularly C fine quality of cigarette, may find the defect developing at lower speeds, in which case he will be able to use the invention without infringing, provided his machine is one which is not capable of running at the specified speed. None of these facts appears to me to have any bearing on the matter. D

But two further reasons are advanced for disallowing the amendment. First, it is said that anyone looking at Bonsack's specification would find in it, without the necessity for any inventive step, the solution of a problem which in Bonsack's own machine could not emerge, in view of its slow rate of speed. In other words, it is said that an inventor who E was directing his mind to the problem would see at once that the solution of it lay in the adoption of Bonsack's inclined trough, or a geometrical equivalent of it. This argument is, in my opinion, completely destroyed by the evidence. Then it is said that the effect of the patent, even when amended, will be to prevent any manufacturer from making such F alterations to and improvements in Bonsack's machine as modern knowledge and experience suggest, since, if, by the addition of an automatic feed and the substitution of longer and more efficient rollers, Bonsack's machine could be made to run, as undoubtedly it could be, at a rate of 900 cigarettes a minute or more, the presence in such an improved G machine of Bonsack's inclined trough would result in an infringement. This argument I cannot accept. We must, I think, assume that a manufacturer who proposed to improve Bonsack's machine by adapting it for high speed would not assume that the presence in it of the inclined trough would remedy the particular defect in question. He would H therefore assume that, if he did improve the machine so that it could run at high speed, the defect would manifest itself. There would therefore be no reason for him so to improve the machine, unless he had himself solved the problem which Molins solved, and realised that Bonsack's inclined trough would give a remedy. Moreover, there is, so far as I know, no principle of patent law which says that a patent which deals with the solution of a real problem, and provides a remedy for it, is deprived of subject-matter, because, if someone took an old machine and altered it in other material respects, he would find a remedy for the defect in a device found in the original machine in which it was inserted A for no such purpose.

The conclusion to which I have come is that the amendment ought to be allowed. The question then arises as to the terms on which it should be allowed. I can see no reason for imposing upon the plaintiffs any terms which would preclude them from obtaining, either in this action B or in any other action, an injunction to restrain the use of machines which infringe the amended specification, or delivery up of such infringing machines. Nor do I see any reason for imposing a term which would in any way prevent the plaintiffs from bringing actions against other infringers. The only matter with regard to which any question arises C is, in my opinion, that of damages. The Patents and Designs Acts, 1907-1932, s. 23, provides as follows :

> Where an amendment of a specification by way of disclaimer, correction, or explanation, has been allowed under this Act, no damages shall be given in any action in respect of the use of the invention before the date of the decision allowing the amendment, unless the patentee establishes to the satisfaction of the court D that his original claim was framed in good faith and with reasonable skill and knowledge.

This section assumes that the court can award damages in respect of an infringement which took place at a time when the specification stood unamended, and I think that this assumption extends, not only to E cases where the patent was good without the amendment, but also to cases where the patent, as unamended, was invalid. The result is rather a curious one, since it leads to damages being awarded in respect of an act which, at the time when it was committed, did not infringe any right of the patentee, since *ex hypothesi* he had no valid patent. Nevertheless, F the section applies to such a case, and, once it applies, the court, so far as regards the action pending at the time of the amendment, is, I think, bound to award damages, provided the patentee satisfies it that his original claim was framed in good faith and with reasonable skill and knowledge. In the present case, I am so satisfied. I think that the G evidence is sufficient to establish that the patentee had no knowledge of Bonsack. It was not brought to his attention by the Patent Office. It was a German document, 48 years old at the date when the patent was applied for, and I am prepared to draw the inference that he knew nothing about it. If he did not know anything about it, it appears to H me that the original claim was framed in good faith, and with reasonable skill and knowledge. There must, accordingly, be an inquiry as to the damage sustained by the plaintiffs by reason of the infringement of claim 1, which is the only claim in respect of which infringement is alleged. There is no dispute that the defendants have infringed this claim. The only remaining question is whether the plaintiffs should be put on terms not to claim damages from users of machines acquired before the date of the present judgment. Sect. 23 in terms refers to "any action," and thus contemplates that claims for damages can be sustained against any person, user as well as manufacturer. I do not find in the present case any ground for depriving the plaintiffs of what, in view of the language of the section, would, I think, be their normal right to claim damages against users. Accordingly, no term will be imposed as a condition of granting leave to amend.

In the result, the patent is declared invalid, but the amendment which I have discussed is allowed, in addition to the amendments allowed by FARWELL, J. There will be an inquiry as to the damage suffered by the plaintiffs by reason of the defendants' infringement of claim 1 as amended.

ROMER, L.J.: I agree.

MACKINNON, L.J.: I agree.

Solicitors: *Bristows, Cook & Carpmael* (for the appellants); *Coote & Co.* (for the respondents).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

STUDEBAKER DISTRIBUTORS, LTD. *v.* CHARLTON STEAM SHIPPING CO., LTD.

[KING'S BENCH DIVISION (Goddard, J.), **October 28, November 3, 1937.**]

Shipping—Bill of lading—Loading—Certificate of surveyor—Limitation of liability—"Package"—Compliance with Harter Act.

A bill of lading, entered into in the United States of America, and therefore required by the law of that country to be expressed to be subject to all the terms and conditions of the Harter Act, provided for the loading of the ship under the inspection of a surveyor of the Board of Underwriters of New York, and the receipt of a certificate in the usual form, certifying that the vessel had conformed to the rules of that Board, and that such certificate should be accepted by the shipper and the owner and consignees of the goods as conclusive evidence that the vessel had been properly prepared, the goods properly dunnaged and stowed, notwithstanding that such certificate merely recites that the vessel completed her loading under such inspection and conformed to the above rules. The certificate granted by the surveyor to the Board stated that the ship had been under inspection from time to time during the loading, and that the stowage, so far as it came under the observation of the giver of the certificate, was in accordance with the above rules. The certificate further stated that the officers of the Board used their best endeavours to insure that their functions were duly carried out, but neither the officers nor the Board were, in any circumstances whatever, to be held responsible for any inaccuracy, error of judgment, default or negligence. In another clause, the bill of lading provided that, in claims for short delivery or damage to cargo, made upon the ship's reaching her destination, the price should be the market price at the port of destination, but it was agreed that the value of each package shipped did not exceed $250, and the carrier's liability should not exceed that sum unless a greater value was specially declared. The cargo consisted of motor cars, expressly stated to be unboxed :—

HELD : (i) the certificate was not conclusive, since it did not certify that the vessel had completed her loading under the inspection of the surveyor, and certified only as to the stowage, so far as it came under the surveyor's observation.

A (ii) the clause providing for the certificate offended against the Harter Act, because it enabled the shipowner to escape the liability from which the Act intended he should not escape upon production of a surveyor's certificate stating that he had done that which in fact he might not have done.

(iii) a motor car, put on a ship without a box or crate, was not a package.

B (iv) the clause limiting liability did not offend against the Harter Act.

[**EDITORIAL NOTE.** The importance of this case lies chiefly in the first point debated, since it seems to be accepted that the certificate is in the usual form. It is not only decided that the certificate of the surveyor of the Board of Underwriters of New York is not sufficient to satisfy the clause in question, but also that this C clause offends against the Harter Act.

AS TO STOWAGE, see HALSBURY, 1st Edn., Vol. 26, Shipping, pp. 205, 206, paras. 293, 294 ; and FOR CASES, see DIGEST, Vol. 41, pp. 469-471, Nos. 3001-3030.]

Cases referred to :

(1) *Walters* v. *Rank* (*Joseph*), *Ltd.* (1923), 39 T.L.R. 255 ; 41 Digest 471, *3030*.

D (2) *Whaite* v. *Lancashire & Yorkshire Ry. Co.* (1874), L.R. 9 Exch. 67 ; 8 Digest 51, *335* ; 43 L.J. Ex. 47 ; 30 L.T. 272.

(3) *Hordern* (*A.*) *& Sons, Ltd.* v. *Commonwealth & Dominion Line, Ltd.*, [1917] 2 K.B. 420 ; 41 Digest 434, *2726* ; 86 L.J.K.B. 1048 ; 116 L.T. 501.

(4) *Tuck* v. *America-Levant Line,* Unreported.

(5) *Calderon* v. *Atlas Steamship Co.*, 170 U.S.R. 272.

E PRELIMINARY ISSUE on points of law as to two questions raised by the defendants in their defence, both questions being directed to the validity of the clauses and exceptions relied on by the defendants. In addition to the clauses set out in the judgment, the bill of lading also contained the following clause :

F This shipment is subject to all the terms and provisions of, and all the exceptions from liability contained in, the Act of Congress of the United States, approved Feb. 13, 1893 [the Harter Act].

The questions agreed between the parties for the decision of the court were :

G 1. The issue of the certificate of Jas. T. Christie, dated Apr. 5, 1933, and the facts therein stated being admitted, whether the said certificate is conclusive evidence that the said automobiles were properly stowed, and whether the plaintiffs are precluded from calling evidence (i) in support of the allegation contained in para. 4 of the points of claim that the defendants were negligent in and about the stowage of the said automobiles, (ii) in support of the allegations contained in para. 5 of the points of claim [unseaworthiness] ?

H 2. The bill of lading and freight notes being admitted, whether the defendants' liability (if any) in respect of each automobile is limited to the equivalent of 250 dollars ?

A. J. Hodgson for the plaintiffs.

J. V. Naisby for the defendants.

Hodgson : Clause 1 is null and void under the Harter Act, which forbids the shipowner to contract out of the duty to stow carefully or to cut down beyond the obligation to use due diligence the duty to provide a seaworthy ship. The provisions inserted by the shipowner must be construed against him. The certificate in no way complies with the clause. The clause limiting liability is bad as it can only limit liability which arises through the breach of a permitted or otherwise valid contract.

Naisby : Clause 1 is not inconsistent with the provisions of the Harter A Act and the certificate which is in the usual form is a sufficient one within the terms of the clause. The limitation of liability applies as to each individual piece of cargo and it is not essential that it should be packed.

GODDARD, J. : In this action, the plaintiffs claim that, by reason B of improper loading or stowage, certain unboxed automobiles shipped by them on the defendants' steamship Hollinside were damaged, and there is an alternative allegation that the damage was caused by unseaworthiness. The defendants rely, in their defence, on certain clauses containing exceptions in the bill of lading, and by their reply the plaintiffs C allege that the clauses in question are void, and rely on sect. 1 of the Harter Act, the shipment in question being from Norfolk, Virginia, and the bill of lading having been signed in New York. By an order made in the action on June 23, 1937, it was ordered that two questions, both directed to the validity of the clauses and exceptions, relied on D by the defendants, should be tried as preliminary points of law.

The bill of lading, as I have said, relates to unboxed automobiles. As required by the law of the United States of America, it is expressed to be subject to all the terms and conditions of the Harter Act, and the first clause that is relied on is cl. 1, which reads as follows : E

> If the vessel completes her loading at this port under the inspection of a surveyor of the Board of Underwriters of New York, and receives the certificate of such survey certifying that the vessel has conformed to the rules of the Board of Underwriters of New York in relation thereto, such certificate issued in the usual form shall be accepted by the shipper, owner and consignees of the goods, as conclusive evidence that the vessel has been properly prepared in every way for cargo, and that F these goods and all other cargo on board have been properly dunnaged and stowed, notwithstanding such certificate merely recites that the vessel has completed loading under said inspection, and has conformed to the rules referred to above.

The certificate which was granted by the surveyor to the Board of Underwriters reads as follows :

> G This is to certify that the Br. S.S. Hollinside whereof C. G. Jones is master, of 2,467 net tons measurement, built at Sunderland in 1930, bound for London, England has been under the inspection of the undersigned at this port from time to time during the course of her loading ; that the stowage, so far as it came under the observation of the undersigned, was in accordance with the rules of the Board of Underwriters of New York. This certificate is not a certificate of seaworthiness.

Then underneath that is written " sixty Studebaker automobiles," and H it is signed, " James T. Christie, surveyor." Then it is stated that the certificate is issued on condition :

> that while the officers and committees of the board use their best endeavours to insure that the functions of the board are properly executed neither such officers nor such committees, nor the board are under any circumstances whatever to be held responsible for any inaccuracy in any report or certificate issued by the board

> or its surveyors, or for any error of judgment, default, or negligence of the surveyors or other employees or representatives of the board.

The plaintiffs contend, first, that, whether or not this clause offends against the Harter Act, the certificate does not certify in accordance with the terms of the clause, and cannot, therefore, be relied upon by the defendants as conclusive evidence that the goods were properly stowed. Of course, on an argument of points of law arising on the pleadings, no evidence is called, and accordingly I cannot determine whether the certificate is in the usual form, though I have no doubt that it is. But, however that may be, it does not appear to me to be a certificate which satisfies the requirements of cl. 1. To satisfy that clause, there must be a certificate that the vessel has conformed to the rules of the board, and that certificate is conclusive only if the vessel completes her loading under the inspection of the surveyor, a fact that one would expect to find in the certificate. But the document relied on by the defendants seems to be in guarded terms. It certifies that the ship has been under the inspection of the surveyor from time to time, not that she completed her loading under his inspection, and then certifies that the stowage, so far as it came under his observation, was in accordance with the rules of the board.

That, in my opinion, is not enough, and accordingly I hold that the certificate is not conclusive. This is enough to dispose of the first point, but, as the question whether this clause offends against the Harter Act was fully argued, and in case a higher court should hold that my view as to the scope of the certificate is wrong, I ought to express my opinion on this point also. The Act, which, in accordance with English decisions, must be regarded as written out in the bill of lading, prohibits, by sect. 1 :

> Any clause relieving the shipowner from liability for loss arising from negligence, fault or failure in proper loading or stowage.

In my opinion, the clause does offend against the Act, because it enables the shipowner to escape the liability from which the Act intends that he shall not escape, if he can produce a surveyor's certificate stating that he has done that which in fact he may not have done. This point has not previously been the subject of express decision. It arose, however, in the case of *Walters* v. *Joseph Rank, Ltd.* (1), in 1923, before BAILHACHE, J. The judge certainly gave an opinion, which he expressly stated was only *obiter*, upon the very point I am now considering. In any case, I am bound to express my own opinion, as the judge's view was only an *obiter dictum*, and my opinion is that the clause is inconsistent with the Act. In any case, the certificate could not be pleaded as an answer to the allegation of unseaworthiness, and I cannot decide on this argument whether or not the plaintiffs can make out a case on this head of their claim. The answer to both parts of the first question, therefore, is in the negative.

The second clause on which reliance is placed by the defendants is cl. 24, which deals with the amount for which the shipowner is liable, and again the plaintiffs say that this offends against the Harter Act. The clause reads thus:

> Also that in the event of claims for short delivery of or damage to cargo being made when the steamer reaches her destination, the price shall be the market price at the port of destination on the day of the steamer's entry at the Custom House, less all charges saved, but it is agreed and understood that the value of each package shipped hereunder, does not exceed the sum of $250 or its equivalent in the currency A
> of the country where the vessel discharges, on which basis the rate of freight is adjusted, and the carrier's liability shall in no case exceed that sum, unless a value in excess thereof is especially declared and stated herein and such extra freight as may be agreed on paid, nor shall the carrier be liable for any claim whatsoever unless written notice thereof shall be given to the carrier before removal of the goods from the wharf, or from alongside of vessel.

Then there are certain other provisions in the clause, which I do not B
think I need read. Apart, however, from the Harter Act, the plaintiffs say, first, that there is a short answer to this clause, namely, that it applies only to a package, and here there was no package. The goods are expressly stated to be unboxed, and the case was argued before me by both parties, who doubtless want a decision on what are known to C
be the actual facts, on the footing that the cars were put on board without any covering, or, to state it in another way, just as they came from the works. I confess I do not see how I can hold that there is any package to which the clause can refer. "Package" must indicate something packed. It is obvious that this clause cannot refer to all cargoes that D
may be shipped under the bill of lading. For instance, on a shipment of grain, it could apply to grain shipped in sacks, but could not, in my opinion, possibly apply to a shipment in bulk. If the shipowners desire that it should refer to any individual piece of cargo, it would not be difficult to use appropriate words, as, for instance, "package or unit," E
to use the language of the Hague rules. The only case that I have been able to find that assists, though perhaps not much, is *Whaite* v. *Lancashire & Yorkshire Ry. Co.* (2). There, the plaintiff put pictures into a wagon with sides but no top, and loaded it on a railway truck. The court held that the wagon was a parcel or package within the Carriers F
Act, as the goods were packed in the wagon. It seems to me that the primary object of this clause is to protect a shipowner against receiving an article of considerable value so covered as to prevent him from seeing what it is, this being at least one of the objects of the Carriers Act, and, in *Whaite's* case (2), BRAMWELL, B., stressed that, though the G
railway company could see that there were pictures in the wagon, they could not see their exact character, as this was concealed by the plaintiff's mode of packing. While I hope I am not giving an unduly narrow construction to the clause, I do not feel that, without doing violence to the English language, I can hold that a motor car, put on a ship without H
a box, crate or any form of covering, is a package.

This disposes of the second question, but again I think that I ought to express an opinion on the point as to whether the clause is in conflict with the Harter Act. Here again, while there is no express decision, there is valuable assistance to be obtained from the judgment of

HORRIDGE, J., in *Hordern (A.) & Sons, Ltd.* v. *Commonwealth & Dominion Line, Ltd.* (3), at p. 425, in which he refers to an unreported decision of BAILHACHE, J., in *Tuck* v. *America-Levant Line* (4). Both HORRIDGE, J., and BAILHACHE, J., followed the opinion of the Supreme Court of the United States of America in *Calderon* v. *Atlas Steamship Company* (5),
A and held that the clause did not conflict with the Act. The reason, as I understand it, is this: the Act does not prevent the parties from agreeing as to the value of the goods shipped, and, if the shipowner accepts liability up to the agreed value, he is not limiting his liability. It is clear here that it was open to the shippers to declare their goods at a
B value higher than $250, in which case they would have to pay a higher freight. It is not as if the shipowner would accept goods only on the terms that he was not to be liable beyond $250. In any case, I am content to follow the opinion of HORRIDGE, J., in the case to which I have referred, and hold that the Harter Act does not invalidate the
C clause, but, as I have held that, in the particular circumstances of this shipment, the clause has no application, the answer to the second question is also in the negative. The plaintiffs must have the costs of this argument.

Both questions answered in the negative.

D Solicitors: *Ince, Roscoe, Wilson & Glover* (for the plaintiffs); *Lightbounds, Jones & Co.* (for the defendants).

[*Reported by* C. ST. J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Considered. *Re* COXEN.
[1948] Ch. 747

E

Re TALBOT-PONSONBY'S ESTATE, TALBOT-PONSONBY *v.* TALBOT-PONSONBY.

[CHANCERY DIVISION (Crossman, J.), **October 21, 1937.**]

F *Will—Construction—Conditions—Validity—Devisee to make estate his home—Not to allow a named person to set foot on property.*

A testator by his will devised the L. estate to his son upon condition that he made the same his home, and upon the further condition that he did not allow a named person to set foot upon the property:—

HELD: the conditions were not void for uncertainty or impossibility. There would be no difficulty in saying whether or not the named person
G had come upon the property; and the effect of his having come there in fulfilment of a duty would be a matter to be determined if and when it arose.

[**EDITORIAL NOTE.** This case differentiates with care between the impossibility, and the difficulty, of enforcing a condition subsequent. Such a condition may be invalid if it is impossible, but not because it is merely difficult to enforce.

H AS TO CONDITIONS SUBSEQUENT, see HALSBURY, 1st Edn., Vol. 28, Wills, pp. 583-585, paras. 1156-1158; and FOR CASES, see DIGEST, Vol. 44, pp. 44 444, Nos. 2663-2687.]

Cases referred to:

(1) *Clavering* v. *Ellison* (1859), 7 H.L. Cas. 707; 44 Digest 440, *2661* L.J. Ch. 761.

(2) *Re Borwick, Borwick* v. *Borwick*, [1933] Ch. 657 ; Digest Supp. ; 102 L.J. Ch. 199 ; 149 L.T. 116.

(3) *Re Wilkinson, Page* v. *Public Trustee*, [1926] Ch. 842 ; 44 Digest 442, *2678* ; 95 L.J. Ch. 528 ; 135 L.T. 736.

(4) *Fillingham* v. *Bromley* (1823), Turn. & R. 530 ; 44 Digest 442, *2675*.

(5) *Re Wright, Mott* v. *Issott*, [1907] 1 Ch. 231 ; 44 Digest 468, *2883* ; 76 L.J. Ch. 89 ; 95 L.T. 697. A

(6) *Wemyss* v. *Wemyss's Trustees*, [1921] S.C. 30 ; 44 Digest 443, case *b*.

ORIGINATING Summons to determine whether certain conditions in the will of the testator were void as being too uncertain or contrary to public policy.

H. O. Danckwerts, for the plaintiffs, stated the facts. B

Wilfrid M. Hunt for Edward Fitzroy Talbot-Ponsonby : The point is that the devisee must reside on the estate for a time which is indefinite. Also, the devisee must not allow a certain person to set foot upon the premises. The court cannot decide exactly what is to be done, and therefore the conditions are void. The court will deal with the matter C as from the beginning, in order that the devisee may know what he has to do, so as to avoid a forfeiture. The testator has attempted to impose conditions which are too uncertain, and therefore they are void. There is also the question whether or not the conditions are contrary to public policy. [Counsel referred to *Clavering* v. *Ellison* (1), *Re Borwick,* D *Borwick* v. *Borwick* (2), *Fillingham* v. *Bromley* (4), *Re Wilkinson, Page* v. *Public Trustee* (3).]

Hon. C. R. Russell for the testator's niece, Mrs. A. R. C. Gillett, who would take in the event of a forfeiture : I agree that there is a condition subsequent. Both conditions are perfectly plain. Everybody knows E what the testator meant. There have been many cases on conditions requiring residence, and, so far as I know, there has been only one case in which the particular condition has been held void for uncertainty. To say that this condition is void for uncertainty is to imperil almost every condition of this nature. There have been many cases in which F it has been considered what is meant by "reside," but the judges have not found any difficulty in saying that this was a condition of which they could approve. As regards not allowing the person named to set foot on the estate, only some voluntary act of the beneficiary could be a breach of the condition. It is not reasonable to suppose G that it was the testator's intention to penalise his son, whatever may have been his intention in imposing this condition. [Counsel referred to *Re Wilkinson, Page* v. *Public Trustee* (3), *Re Wright, Mott* v. *Issott* (5), *Wemyss* v. *Wemyss's Trustees* (6).]

H

CROSSMAN, J. : The question which arises in this summons is as to the meaning of the testator, Charles George Talbot-Ponsonby, in attempting to impose on the son, Edward Fitzroy Talbot-Ponsonby, a condition to make the house devised his home, and a further condition that he is not to allow a man named L. to set foot upon the property.

The second defendant is the lady who would take the property on an event happening which would cause a forfeiture. The will is dated July 20, 1933, and the testator died on Jan. 16, 1937. The testator was a careful member of the Bar, and the will suggests that it was made by the testator himself. But I must consider it in the ordinary use of language, and not in any special way. Mr. Hunt contended that the two conditions are void and have no effect, on the ground that they are too uncertain to be enforced. The question which I have to answer is whether the conditions are such that the executors ought to take steps to ensure compliance with them. Mr. Hunt has argued that the conditions are void, because they are too uncertain. He has relied upon a passage in the opinion of Lord Cranworth in *Clavering* v. *Ellison* (1), at p. 725, referred to by Bennett, J., in *Re Borwick*, *Borwick* v. *Borwick* (2), at p. 668. What the judge was dealing with there was the construction of a condition subsequent contained in a settlement providing that an interest, which would otherwise have become vested in a grandchild, should be forfeited if the grandchild should at any time before attaining a vested interest under the trusts be or become a Roman Catholic, or not be openly or avowedly Protestant. The question was whether that was void. As a matter of fact, it was held to be void, on the ground that it would interfere with a parent's performing his parental duty; but in his judgment the judge said, at p. 668:

> In my judgment the condition is also bad in law because of its uncertainty. In his speech in the House of Lords in *Clavering* v. *Ellison* (1), Lord Cranworth, dealing with the validity of conditions subsequent which operate to defeat a vested interest, says as follows: "I consider that, from the earliest times, one of the cardinal rules on the subject has been this: that where a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine." There is, in my judgment, no reason for holding that these observations are not applicable to a condition subsequent which operates to destroy a contingent interest.
>
> Again I ask myself, was it possible for a court on Aug. 31, 1910, to see precisely and distinctly what facts and circumstances would make it possible to say of an infant affected by the condition that he had either become a Roman Catholic or was not openly and avowedly Protestant? I answer that question in the negative. I do not think anybody could have said at that date what they were, and I do not think that any two people would have agreed as to what they were, and so, as I have said, I hold the condition bad in law on the ground of uncertainty.

Mr. Hunt's argument is that, on the same principle, I ought to hold this condition void for uncertainty, because I cannot say now upon the happening of what event Mr. Edward Talbot-Ponsonby is to forfeit his estate. That is to say, I cannot say what is the real meaning of the expression "to make the house his own." Mr. Russell, who represents the lady who would take on the event happening which would cause a forfeiture, has referred me to a decision of Tomlin, J., in *Re Wilkinson*, *Page* v. *Public Trustee* (3), where he had to deal with a different condition, which read:

> Provided however that in the event of my said niece voluntarily ceasing to make the said dwelling-house her permanent home as aforesaid, I direct that the said sum of £7,000 and the investments representing the same shall fall into residue.

Tomlin, J., held that the gift was not invalid either as contrary to public policy or as void for uncertainty. He says, at p. 849:

> . . . the only remaining question is: (1.) whether the alternative event specified is too uncertain to be ascertained and, if so, whether that affects the validity of the gift to her for life, and (2.) whether, assuming that there is no uncertainty, an event will happen in certain hypothetical circumstances which will determine the interest? A
>
> I confess I do not feel any difficulty in giving a rational meaning to the words "to make the dwelling-house her permanent home"; I think it is reasonably plain what that means; it seems to me it means, to keep it up as what may be colloquially called her headquarters. I do not think there is any particular difficulty in attaching a reasonable meaning to the phrase. I do not propose, and I do not think it necessary for me to-day to define precisely what I understand the phrase to mean. I am satisfied that it bears a sufficiently definite meaning to enable me to say that there is no case of uncertainty which renders the gift in any way bad, B or defective. The fact that the language of the will is not uncertain has, of course, no necessary bearing upon the question whether when particular events have happened there may not be some difficulty in saying whether or not they fall within that which is contemplated by the will; but that is not a matter with which I have anything to do.

What Tomlin, J., said was that there might be some difficulty. If he C had said that there might be impossibility, it would be another matter, but the fact that there might be some difficulty does not seem to me to be conclusive. I do not think that anybody would deny that, in certain circumstances, it might be difficult to say that Mr. Edward Talbot-Ponsonby had ceased to make the estate his home. I am asked to say D that it would be impossible to determine this point. Mr. Hunt also referred me to the case of *Fillingham* v. *Bromley* (4), where the words were "live and reside," and the decision was that the condition was held to be too uncertain. The words were:

> live and reside on the said estate . . . and for default thereof, all the devised estates E to go over to the person next in succession.

The question arose under a specific performance action, and Lord Eldon, L.C., held that a good title had been made out, and specific performance was decreed. That is, the condition could not take effect. In his judgment, Lord Eldon, L.C., said, at p. 536: F

> I cannot agree to the construction of this will which has been contended for, that the testator meant merely to prevent the letting of the estate; there are two things which he clearly meant to prevent, one the letting, the other the non-living and residing: . . . occupation is not living and residing: there are many purposes, for which the word inhabitant has been taken to include persons, as inhabitants of places in which they never were. The question comes to this, what it was the testator meant, and whether, unless a clear meaning can be put upon the will, G the court is to take upon itself to say that there has been a forfeiture.

I feel there is a difficulty, and one's sympathy would be with the persons who say that this condition could not take effect. I feel no real doubt as to what the testator meant, and, if some circumstances were put before the court, and the court were asked to say whether, in those H circumstances, there had been a forfeiture of this interest under the will, I do not see any reason why the court would be unable to determine that question. The only difficulty I feel is whether the court can see from the beginning upon the happening of what event the estate is to determine. Whether in particular circumstances the devisee has ceased to make the estate his home or not may be difficult to determine, but I am not prepared to hold that it is an impossibility to determine it. I do not hold the condition void for uncertainty. I do not think there would be any difficulty in saying whether the owner had allowed the man named to come upon the property, within the meaning of this will. One has to think that, in the event of his becoming a postman, he would have a duty to enter upon the property. That is a matter to be determined when the question arises. But, at the present moment, it is possible to say what are the circumstances in which the conditions would take effect. They are, first, in ceasing to reside, and, secondly, in allowing the man to set foot upon the property. What comes within this may have to be determined hereafter. I hold, therefore, that the conditions are binding upon the defendant. I do not think that I ought to give the plaintiffs directions, because I cannot imagine the innumerable circumstances which might amount to a breach of the conditions.

Solicitors: *Gregory, Rowcliffe & Co.* (for all parties).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

COMPANIA NAVIERA VASCONGADA *v.* STEAMSHIP OR VESSEL CRISTINA AND ALL PERSONS CLAIMING AN INTEREST THEREIN.

THE CRISTINA.

[COURT OF APPEAL (Greer, Slesser and Scott, L.JJ.), **July 30, October 15, November 8, 1937.**]

Shipping—Foreign-owned vessel—Requisition by foreign government—Vessel outside territorial jurisdiction—Claim for possession by owners—Motion to set aside writ—Impleading a foreign government.

The plaintiffs were the owners of the Cristina, a ship registered at Bilbao. The Spanish government issued a decree requisitioning all vessels registered at Bilbao. At the time when the decree was issued, the Cristina was not in a Spanish port, nor in Spanish territorial waters, nor did she subsequently enter such waters. Upon her arrival at Cardiff, the Spanish Consul forcibly took possession of the Cristina. The plaintiffs issued a writ *in rem* to regain possession of the ship, and arrested the ship. The Spanish government moved to set aside the writ, on the ground that the result of the action would be to implead a foreign state:—

HELD: the necessary result of these proceedings would be to call upon the Spanish government to prove its right to the possession of the vessel. The court, therefore, had no jurisdiction in the matter, and the writ ought to be set aside.

[**EDITORIAL NOTE.** The question here is whether the requisitioning of ships by the Spanish government is sufficient to prevent the arrest of a ship by a British court. The ship in question was not, and had not been, in Spanish territorial waters since the decree had been pronounced, but, upon the Spanish government stating that it was impleaded, the courts have decided that the matter is one for diplomatic action, and outside their jurisdiction.

AS TO VESSELS UNDER REQUISITION TO A FOREIGN GOVERNMENT, see HALSBURY, Hailsham Edn., Vol. 1, p. 95, para. 121; and FOR CASES, see DIGEST, Vol. 1, pp. 109-111, Nos. 127-146.]

Cases referred to :

(1) *The Annette, The Dora*, [1919] P. 105 ; 38 Digest 7, *12* ; 88 L.J.P. 107.

(2) *Aksionairnoye Obschestvo A. M. Luther* v. *Sagor (James) & Co.*, [1921] 3 K.B. 532 ; 38 Digest 7, *13* ; 90 L.J.K.B. 1202 ; 125 L.T. 705.

(3) *The Jupiter*, [1924] P. 236 ; Digest Supp. ; 93 L.J.P. 156 ; 132 L.T. 624.

(4) *The Gagara*, [1919] P. 95 ; Digest Supp. ; 88 L.J.P. 101 ; 122 L.T. 498.

(5) *The Parlement Belge* (1880), 5 P.D. 197 ; 41 Digest 931, *8213* ; 42 L.T. 273.

APPEAL from the decision of BUCKNILL, J., dated Oct. 15, 1937.

The facts of the case are sufficiently set out in the judgments.

The matter first came before BUCKNILL, J., on July 30, 1937, when, after hearing arguments, he delivered the following judgment.

BUCKNILL, J. : This is a motion by the Spanish government to set aside a writ *in rem*, and the arrest of a ship called the Cristina, the plaintiffs to the writ being the Compania Naviera Vascongada. The writ is stated to be between the Compania Naviera Vascongada and the steamship or vessel Cristina, and all persons claiming an interest therein. It is directed to the steamship or vessel Cristina and all persons claiming an interest therein. The Cristina is described as being of the port of Bilbao, now lying in the port of Cardiff, in the county of Glamorgan. The indorsement is this :

> The plaintiffs as sole owners of the steamship or vessel Cristina of the port of Bilbao, Spain, claim to have possession adjudged to them of the said steamship or vessel Cristina.

It was admitted by Mr. Willink, on behalf of the plaintiffs, that the applicants to this motion, who were represented by Mr. Pilcher, are an independent sovereign state recognised by His Majesty's government. The question which I have to decide is whether the Spanish government, who are the applicants in the motion, have in this vessel, the Cristina, an interest of such a kind that the result of the action, if pursued, will be to implead that foreign state. If they have such an interest that they will be impleaded, then it seems to me quite clear, on the authorities, that the writ and the arrest ought to be set aside. The points taken by Mr. Willink are that, before it can be said that the government of Spain is impleaded by this action, they must at least show that they have a property in the ship, or that the ship is in their possession. He argues that the affidavits put in on behalf of the Spanish government do not show that this ship, the Cristina, is either the property of the Spanish government or in their possession. I need not read the affidavits. They are both made by the same deponent, Antonio de la Cruz Marin, councillor of the Spanish Embassy in London. The first one was sworn on July 28, and it is to this effect, that the Cristina was in July taken under a requisition of the Spanish government by its duly authorised agents, in pursuance of a decree of the Spanish government, dated June 28, 1937, and published in the Official Gazette on June 29. I will refer in a moment to the requisition and the decree. In para. 2 of his affidavit, he says that, in pursuance of the said decree, the government of Spain claims the possession of the ship by virtue of the said requisition. In a further affidavit, sworn on July 29, the same gentleman swears that he is informed and believes that the requisitioning of the Cristina by the Spanish government was carried out by a letter sent by the Spanish Consul at Cardiff on July 9, 1937, to the captain, agents and cargo-owners of the said ship, and the port and immigration authorities at Cardiff, informing them that "my said government had requisitioned the said ship under the decree." Before I refer to the decree, one has to consider what the Spanish government state to be the facts, before it can be said that they are impleaded. I think that they must show that they either own the ship or are in possession of the ship, because, in the case of *The Annette, The Dora* (1), to which I was referred, where the facts raise the question of the right of an independent sovereign state to set aside a writ and arrest in an action of this kind, Hill, J., says, at p. 113:

> . . . the real question to be litigated is one as to the right of possession between the plaintiff, who is admitted to be owner, and the master, who is in fact in possession, claiming the right of possession under contract with the Provisional Government, but still claiming to be entitled to possession.

It seems to me, therefore, that, if the Spanish government claim the right to possession of this ship, they are persons who come within the meaning of the words of the writ, persons claiming an interest in the ship, and that their interest, which is a possessory right—or a right to possession—will be affected if the case proceeds to adjudication and the plaintiffs are granted what they ask for in their writ, namely, to have possession adjudged to them. Now, does the decree in this case give to the Spanish government a right to possession? I need not read it through. It is signed, I may say, by the President of the Spanish government. It starts off in this way:

> The present moment calls for an ever more effective control of those departments or services in which the government considers it desirable to exercise immediate and direct control in order the better to be able to meet the requirements of the war. . . . The control of the state must be sufficiently extensive in order to enable it at its sole will, represented by the government or its officers (bodies), to direct and administer the means of communication and marine transport without consequently being limited to simple inspection.

Then it goes on to direct that all the vessels registered in the port of Bilbao are requisitioned, and are at the disposal of the legitimate government of the Republic:

> Any Spanish shipowner or owner of a vessel of the register referred to in the last preceding article shall be bound to hand over its administration to the bodies which the government may designate, for the purpose of receiving orders and instructions in relation to the service to be rendered by the vessel.
>
> Art. 3. No private person or undertaking shall be able to claim delivery of the vessel for their private service, so long as the control which the government establishes by the present enactment is maintained. Any private person or undertaking who shall claim to use its own initiative in order to continue working freely shall have to address himself (itself) to the Ministry of Communications, Transport and Public Works, which shall allow or disallow the claim on the basis of the reasons put forward and the importance of the service which it is proposed to undertake.
>
> Art. 4. Provisionally, and until such time as a liaison body (officer) who may be considered necessary, is created, all the vessels of the register of Bilbao shall be under the authority of the general directorate of the mercantile marine. The

director of the latter directorate shall be able freely to delegate his directive functions to other persons or bodies administering vessels.

Art. 5. In the entries of the register and official list of vessels, and in the central register, there shall be recorded by marginal note the fact of having been subjected to the restriction to which this decree refers. The same circumstance shall be recorded in the documents of the vessels and in the corresponding consular register.

Art. 6. Insurance and supplies contracts in force shall continue to be in force until they are lawfully discharged. The prolongation of or contracting of new policies shall be the subject of subsequent decisions in each case. A

Art. 7. Transfers of properties in vessels made since July 18, 1936, and those which may be made in future shall be null and void if they do not receive the approval of the Minister of Communications, Transport and Public Works.

Now, it seems to me that, if a vessel comes within that decree, the government by its decree has acquired a sufficient right to possession of that ship to entitle that government to say that the writ in this action B does implead the government, and that the writ should be set aside. But there is one point which, to my mind, is not yet established, and that is that I am not satisfied at present that this decree was ever intended to apply to this ship, because I think that it is very unlikely that the Spanish government would requisition a ship which was not within C its jurisdiction—territorial jurisdiction—at the time, but was within the jurisdiction of this country. It seems to me to be contrary to the comity of nations to do anything of that sort, because it might lead directly to a conflict between the courts of this country and the court of Spain as to what was to be done about the control of the ship. Now, at present D I have no information as to where this ship was when the decree was made, or, indeed, whether or not the ship has ever been within the jurisdiction of the Spanish government since the decree was made, and, for that reason, I think that this matter must be adjourned, in order that that point may be cleared up. Moreover, as Mr. Willink has pointed E out, he has had no opportunity at present—or rather his clients have had no opportunity at present—of answering these affidavits, which were filed only two days ago. He asks for an adjournment in order to enable his clients to deal with the matter and the points raised therein, and I think that on that ground also the matter must be adjourned. Therefore, F I adjourn this motion in order that both sides may file affidavits dealing with the matters about which I want further information.

The matter was then adjourned, and, on Oct. 15, 1937, further information having been supplied to the court, BUCKNILL, J., concluded his judgment as follows : G

BUCKNILL, J. : I have not been asked to review the decision given on July 30, and I am of the same opinion now. But I did, at that hearing, say that I was not then satisfied that this decree was ever intended to apply to the Cristina, because it seemed unlikely that the Spanish government H would requisition a ship which was not within its territorial jurisdiction, but was within the jurisdiction of this country. I asked for information as to where the Cristina was when the decree was made, and whether she had ever been within the jurisdiction of the Spanish government since the making of that decree. Since the hearing on that date, the parties have agreed that the Cristina was not in a Spanish port, or in Spanish territorial waters, at the time of the decree, or at any time thereafter, and, therefore, that information has been supplied to the court. The question is whether, in these circumstances, this writ should be set aside at the instance of the Spanish government. Mr. Willink, on behalf of A the owners, has said that this is a matter of very grave importance, both from a commercial and from an international point of view. He says that it is an "unprecedented situation," and has indicated to me that this case, and other cases of a similar nature, would involve Spanish shipping in this country, which may be worth anything up to £2,000,000 B or more.

It is obviously very important that the matter should be decided one way or another as soon as possible, and I am sorry that, owing to the fact that the motion was not brought on before the last day of term, the lack of necessary evidence made it necessary that the adjournment C should go over the long vacation. Both parties have intimated to me that they intend to take the matter to the Court of Appeal in the event of their getting an adverse decision here, and it seems to me very proper that they should have the opportunity of getting that decision from the Court of Appeal as soon as possible. For that reason, instead of D reserving my judgment and dealing with the matter more fully than I can to-day, I propose to give my decision now, and quite shortly.

I am satisfied that the Spanish government intended the decree to apply to the Cristina, and I am satisfied that, in pursuance of that intention, they have taken such steps as they could to take possession of E the vessel at Cardiff, and that they did that before the writ in this action was issued. It may be that that action is not in accordance with our ideas of international comity. It may be that the action of the Spanish government in requisitioning these ships without compensation is not one which commends itself to our ideas of justice. But I have F nothing to do with that. If the action of the Spanish government has, in any way, been contrary to the comity of nations, then it is for the British Government to make the proper representations through diplomatic channels. If the government of Spain has appropriated these ships without compensation, I would refer to the judgment of SCRUTTON, L.J., G in *Aksionairnoye Obschestvo A. M. Luther* v. *Sagor* (*James*) *& Co.* (2), where SCRUTTON, L.J., said, at p. 556:

> Should there be any government which appropriates other people's property without compensation, the remedy appears to be to refuse to recognise it as a sovereign state. Then the courts could investigate the title without infringing the comity of nations. But it is impossible to recognise a government and yet H claim to exercise jurisdiction over its person or property against its will.

Now, as I said at the beginning, the Spanish government, which has taken this action in the matter, is an independent sovereign state recognised by this country, and is so admitted to be by the owners of the ship. That being so, I think it is impossible for this court to exercise jurisdiction over the Cristina, a ship which they—the Spanish government—claim to have requisitioned, in which they claim to have a right of possession, and actually to be in possession of which they claim to have taken such steps as were available to them. I think that this writ should be set aside.

As regards the point that the necessary affidavits have not been made from the appropriate quarter, I am satisfied that the Spanish government A have made this application through their responsible officers, and have properly put forward the essential allegations in the case. For that reason, I direct that the writ and the arrest be set aside.

The plaintiffs appealed.

H. U. Willink, K.C., and *H. G. Willmer* for the appellants. B

G. St. C. Pilcher, K.C., and *Owen L. Bateson* for the Spanish Republican Government.

Willink, K.C., *;* In international law, requisitioning has no effect upon vessels which are outside the territorial waters of the requisitioning state. Where a state behaves as the representatives of this state have C behaved, it does not deserve the same measure of comity as do other nations. The situation is unprecedented. The Spanish government took steps to secure breaches of the peace in British ports. There has been a breach of international comity. The court should ask the advice of the law officers in a matter such as this, where the applicants have not D observed the principles of international comity. Our ports may be made scenes of disorder, and even scenes of bloodshed. [Counsel referred to *The Jupiter* (3), *The Parlement Belge* (5), and DICEY'S CONFLICT OF LAWS, 5th Edn., 192.] The principle is similar to that in *The Jupiter* (3), but the facts here are extreme. E

Pilcher, K.C., was not called on.

GREER, L.J.: This is an appeal from the order of BUCKNILL, J., setting aside the writ for possession and the arrest of a vessel called the Cristina. The Cristina is a vessel belonging to a company which is F now carrying on its business at Marseilles, and sailing its ships from Marseilles. At no material time was the vessel with which we are dealing within the jurisdiction, or within the territorial waters, of the Spanish government, but I think, as will appear in a moment, that that is wholly irrelevant to the question we have to determine. There can be no doubt G that certain decrees were passed by a body which may or may not have had in the constitution of Spain power to make those decrees, so that the decrees became law. There is a dispute about that, and there is some evidence, which was before the judge, and before us, to the effect that those decrees were entirely unconstitutional, but I do not think that that H has any bearing upon the question we have to decide. When this vessel, the Cristina, arrived in Cardiff, possession was taken, rightly or wrongly —it does not seem to me to matter—by the Spanish government, and they claim, in answer to the claim of the shipowners, to retain the possession which they have already taken. It was frankly admitted by Mr. Willink, for the shipowners, that it is immaterial to our decision whether the government of Spain claim to be the owners of the vessel, or whether they claim to have a right of possession only, the question being not what was the nature of their claim, nor if that claim was one on which they were likely to succeed, but whether or not they had in fact submitted to the A jurisdiction of this court. Mr. Willink, in a bold argument, desired us to say that, by reason of their conduct in seizing the vessel contrary to recognised principles of international good manners, we could not give effect to the rules which have been laid down so frequently with regard to the powers of the courts of justice in this country to make orders binding B upon foreign governments.

In my judgment, the case is entirely within the decision in *The Jupiter* (3). A claim for possession was made by the owners against somebody whom they alleged had interfered with their possession. The only people who had interfered with their possession were the government C of Spain, in the present case. Accordingly, they cannot succeed in their action *in rem* unless they are entitled to get an order against the government of Spain. The government of Spain says, in so many words: "We do not consent to the jurisdiction of the English courts to make an order against us." In those circumstances, I think there is ample authority D for the proposition that the right order to make is the order which the judge made.

In the course of his judgment in *The Jupiter* (3), Bankes, L.J., referring to the decision in *The Gagara* (4), said, at p. 242:

> In my opinion, that is contrary to all the principles upon which this court has E acted where a claim is made by a duly recognised independent sovereign state. It seems to me that the necessary result of these proceedings is to call upon the Soviet Government to assert its title, and to have the question of the ownership, or the right to possession of this vessel, litigated in the courts of this country.

That is what the plaintiffs are claiming here, that the right to possession of the Cristina shall be litigated in the courts of this country. On the F authority of *The Jupiter* (3), and on that of many other cases, that cannot be done. The rights of the owners and the rights of the crew, if there are any, must be asserted by diplomatic pressure, and cannot be asserted by a judgment of this court.

For these reasons, I think the appeal should be dismissed with costs.

G

Slesser, L.J.: I agree, and have to add a short observation with regard to only one point. Mr. Willink sought to distinguish this case from *The Jupiter* (3), which, I agree with Greer, L.J., entirely binds us in this present matter. He sought to say, as I understood him, that, H because of alleged improprieties on behalf of the government which was claiming to be exempt from the jurisdiction of the court—allegations about which I say nothing, whether they be well-founded or not, for it is not for us to consider that matter—the comity of states, which normally supports the exclusion of the right of action against the sovereign power, should not prevail. I think that that argument is not well-founded, and I would add only that it is a recognised principle of law that the exemption of a foreign state from suit extends to cases where there is alleged a violation of a legal right, such as a tort, as well as to cases of contract, showing, to my mind, that, whether or not the particular act done is a wrongful one from the point of view of English law, the degree of the wrongfulness—whether, as in one case, it extends to a breach of promise of marriage, or, A in another case, to an actual tort—is immaterial, that the exemption is absolute, and that the consideration which Mr. Willink urged is not one which this court is justified in considering.

SCOTT, L.J.: I agree with the judgments delivered, but think that B the simplest way of stating the position is that, before the writ was issued in this case, this vessel was already in the actual possession of the Spanish government. Consequently, that possession could not be displaced without an order of the court upon the Spanish government. That order, for the reasons given by my brothers, cannot be made unless C the Spanish government consents that it should be made. It does not so consent, and the court has therefore no jurisdiction in the matter, and must, in accordance with the rule of comity, set aside the writ as done by BUCKNILL, J.

Appeal dismissed. Leave to appeal to the House of Lords refused. Stay D *granted for one week.*

Solicitors: *Ince, Roscoe, Wilson & Glover* (for the appellants); *Petch & Co.* (for the Spanish Republican Government.)

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

E

R. *v.* ROTHFIELD.

[COURT OF CRIMINAL APPEAL (Lord Hewart, L.C.J., Humphreys and du Parcq, JJ.), **November 8, 1937.**] F

Criminal Law—Bill of indictment—Preferment—No committal for trial—Application to judge in chambers—Discretion of judge—Inquiry into exercise of discretion—Administration of Justice (Miscellaneous Provisions) Act, 1933 (c. 36), *s.* 2.

The Court of Criminal Appeal will not inquire into the exercise of the G discretion of a judge in granting leave to prefer a bill of indictment under the Administration of Justice (Miscellaneous Provisions) Act 1933.

It is not essential that the bill of indictment shall accompany the application in such a case. It is sufficient that it is before the judge when he deals with the application.

H

[**EDITORIAL NOTE.** Under the Administration of Justice (Miscellaneous Provisions) Act, 1933, provision is made for the preferment of a bill of indictment without a committal for trial, provided the consent of a judge or a commissioner of assize is obtained. The case considers the procedure before the judge. The Court of Criminal Appeal will not interfere with the exercise of his discretion in such a matter. It can interfere only where he has acted without jurisdiction.

AS TO INDICTMENT WHERE NO COMMITTAL, see HALSBURY, Hailsham Edn., Vol. 9, p. 127, para. 165; and FOR CASES, see DIGEST, Vol. 14, pp. 208-211, Nos. 1901-1931. See now STONE'S JUSTICES MANUAL, 1937, pp. 954, 955.]

Case referred to:

A (1) *R.* v. *Bray* (1862), 3 B. & S. 255; 14 Digest 210, *1926*; 32 L.J.M.C. 11; 7 L.T. 248.

APPEAL from a conviction at the Central Criminal Court upon the ground that the judge was wrong in law in not quashing the indictment. The facts and arguments fully appear from the judgment.

B *Maurice Healy, K.C.*, and *B. Gillis* for the appellant.

G. D. Roberts, K.C., and *Christmas Humphreys* for the Crown.

HUMPHREYS, J. (delivering the judgment of the court): Henry Isaac Rothfield was convicted at the Central Criminal Court upon an C indictment which charged him with certain misdemeanours, obtaining money by false pretences and fraudulent conversion, and he was sentenced to 4 years' penal servitude. He now appeals upon a point of law against that conviction. His notice of appeal states that the ground, and the only ground, of appeal is that the judge—that is, the Common Serjeant, D before whom the matter came—refused to quash the indictment, and that he was wrong in law in so doing. It is clear that there is no foundation at all for this appeal.

The Common Serjeant had before him an indictment, which, on the face of it, was a perfectly good indictment. It was indorsed by a judge E of the High Court, showing that leave had been given to prefer the indictment. Upon those facts, there was no ground at all upon which the Common Serjeant could have quashed the indictment. It was not for him to enter into the matters which had been entered into before the judge when he gave leave to prefer the indictment. Therefore, this F appeal may be dealt with on the very short grounds that the Common Serjeant was right in refusing to quash the indictment. But Mr. Maurice Healy, who appears for the appellant here, has invited the court to go behind what happened at the Central Criminal Court, and to inquire into the question as to whether or not the judge had acted within his G powers in granting leave to prefer the indictment as he did. Now, it cannot be made too plain, or stated too definitely, that this court will not inquire into the exercise of the discretion of a judge who is sitting and dealing with an application under the Administration of Justice (Miscellaneous Provisions) Act, 1933, and say that he was wrong, if it H is clear that he had jurisdiction to entertain the application.

The first ground which Mr. Maurice Healy has argued before us is that the indictment was bad because, under the rules of the Act to which I have referred, the judge has wrongly exercised his discretion when he granted leave to prefer the bill of indictment. The wrongful exercise of his discretion appears to be this: the rules which are made under the statute have not been complied with. That statute, which I need not read, provides, by sect. 1, for the abolishing of grand juries, perhaps only temporarily:

> . . . but where a bill of indictment has been signed in accordance with the provisions of this Act, the indictment shall be proceeded with in the same manner as it would have been proceeded with before the commencement of this Act if it had been found by a grand jury. . . . A

Under the Vexatious Indictments Act, 1859, there are already provisions for doing that, and obviously it is the intention of Parliament under the Act of 1933 to see that the circumstances under which the prosecution may prefer an indictment against a person not committed for trial shall B be clearly defined, and it is in the interest of the accused person that the law should be clearly defined. An examination of the Vexatious Indictments Act and the Administration of Justice (Miscellaneous Provisions) Act, 1933, will show that safeguards have been introduced into the latter Act. Sect. 2 (2) of the Act provides as follows: C

> . . . no bill of indictment charging any person with an indictable offence shall be preferred unless either: (*a*) the person charged has been committed for trial for the offence; or (*b*) the bill is preferred by the direction or with the consent of a judge of the High Court. . . .

Then there is a proviso, to which I need not refer, and sect. 2 (6) provides that the Lord Chancellor may make rules for carrying this section into D effect, and rules, in particular, for making provision as to the manner in which, and the time at which, bills of indictment are to be preferred before any court, and the manner in which application is to be made for the consent of a judge of the High Court, or of a commissioner of assize, for the preferment of a bill of indictment. E

Under that provision, rules have been made, and it is under those rules that Mr. Maurice Healy says that certain requirements have not been complied with. It must not be thought for a moment that this court is laying down any law that the mere failure to comply with any of the rules will necessarily vitiate the discretion of a judge in granting F leave to prefer a bill of indictment. When one looks at this case, it will be seen that there is not one irregularity. Para. 4 of the rules provides that every application shall be in writing, shall be signed by the applicant or solicitor, and shall be either sent to the judge or commissioner by post or delivered to his clerk. All those provisions were G complied with here. The application, which was in fact by the Director of Public Prosecutions, should have been accompanied by the bill of indictment, and Mr. Maurice Healy says that in this case the indictment did not accompany the application. That is perfectly true. But the application in this case states that the bill of indictment will be lodged H in the Crown Office of the King's Bench Division of the High Court of Justice, and is not to be attached to the application. It is desirable to notice the way in which the application is made, and determined under the Indictment (Procedure) Rules, 1933, r. 7:

> Unless the judge or commissioner otherwise directs in any particular case, his

> decision on the application shall be signified in writing on the application without requiring the attendance before him of the applicant or of any of the witnesses, and if the judge or commissioner thinks fit to require the attendance of the applicant or of any of the witnesses, their attendance shall not be in open court.

In our opinion, it is indeed a compliance with the rule if the indictment for which leave is being asked to prefer is before the judge when he deals with the application which is being made to him. It is conceded by Mr. Maurice Healy that the judge had the indictment, together with the application, when he gave his leave to prefer the indictment. There is nothing whatever in that point.

Mr. Maurice Healy has argued other matters that appear to go to the exercise of the discretion of the judge. That is a matter into which this court will not inquire, but, since it is desirable that it should be made plain that no injustice has been done in a criminal case in which a person has been convicted and sentenced, it is right to refer to the facts of the case, in order to show that the judge had not exercised his discretion improperly, and that it was a matter for him, and that there was no injustice as the result of that discretion.

This is a case in which the present appellant had been arrested on Nov. 12, 1936. He was brought up at the Mansion House on Dec. 11, and evidence was taken on that day and on Dec. 18, 1936, and Jan. 7, 14, 22, 29, 1937. The next hearing was fixed for Feb. 19, and on that day the case was adjourned until March, because the alderman was ill, as the result of an accident. On Mar. 19, it was found that the alderman could not continue the hearing at all, and then there were two possible courses open. One was to bring back to the police court 30 witnesses who had already been called—some of whom came from remote parts of the county, six from Scotland and other remote parts of England—and to go through their evidence, which had already been given, and with regard to which the appellant's advocate had either cross-examined, or had had the opportunity of cross-examining, if desired. That was one course. The other was not to call any witnesses, but to ask the judge in chambers for leave to prefer a bill of indictment in the terms of the statute passed for the purpose on the evidence which had already been given plus a small portion of the evidence of one material witness—one who had been defrauded—and a number of other formal witnesses. The judge, having those facts before him, exercised his discretion, a discretion into which this court has no jurisdiction to inquire. In our view, that being the only point which has been argued as to the propriety of this conviction, there is no ground for quashing the conviction.

We have been referred to a number of cases, and Mr. Maurice Healy places some reliance on the judgment of BLACKBURN, J., in *R.* v. *Bray* (1), a case which was decided in 1862, under the provisions of the Vexatious Indictments Act, and in which he observed that he was in the habit of refusing to make orders upon applications where the parties had not gone before a magistrate. That was on an application in which the only material before the court was a newspaper cutting. BLACKBURN, J., continued that, where the parties had been before a magistrate, and depositions had been taken, and it afterwards turned out that there was a reason for preferring an indictment in a way provided for by the Act, and they then came before him, he was then in the habit of giving his consent, if he saw that a clear case had been made out. So far from being a matter in which the judge in chambers acted wrongly in the exercise of his discretion, that case only strengthens this case. There is no ground for this appeal, and it is dismissed.

Appeal dismissed.

Solicitors: *Emanuel Garber* (for the appellant); *Director of Public Prosecutions* (for the Crown).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

Re DOWNES & LOBBS' CONTRACT, DOWNES *v.* LOBBS.

[CHANCERY DIVISION (Crossman, J.), **November 4, 1937.**]

Sale of Land—Option to purchase—Duration—Three years certain—Provision for notice—Whether determinable at expiration of three years.

An agreement in writing giving an option to purchase land contained the following clause as to its duration and determination: "the option shall operate for three years certain from the date hereof and after the expiration of that time may be determined by the grantor giving to the grantee 12 months' notice to terminate at the expiration of the said term or at any later date":—

HELD: a notice given before the end of the second year of the operation of the option to determine it at the end of the third year was valid, and the option was rightly determined at the end of the third year.

[**EDITORIAL NOTE.** There is a number of cases in which it has been held that a grant for a number of years "certain" creates a term that cannot be determined at the expiration of the "certain" period. Whether this be so or not is always dependent upon the particular form of words used; but, if it is desired to create a term determinable upon the expiration of the fixed period, it is desirable that the clause shall state definitely that notice may be given before the expiration of that period to determine the term at its expiration.

FOR THE LAW ON THE POINT, see HALSBURY, Hailsham Edn., Vol. 20, pp. 123, 124, para. 136; and FOR CASES, see DIGEST, Vol. 31, pp. 439, 440, Nos. 5846-5856.]

Cases referred to:

(1) *Thompson* v. *Maberly* (1811), 2 Camp. 573; 31 Digest 439, *5847*.

(2) *Brown* v. *Symons* (1860), 8 C.B.N.S. 208; 34 Digest 55, *296*; 29 L.J.C.P. 251; 2 L.T. 323.

(3) *Langton* v. *Carleton* (1873), L.R. 9 Exch. 57; 34 Digest 63, *387*; 43 L.J. Ex. 54; 29 L.T. 650.

(4) *Costigan* v. *Gray Bovier Engines, Ltd.* (1925), 41 T.L.R. 372; 34 Digest 63, *388*.

(5) *Re Searle, Brooke* v. *Searle*, [1912] 1 Ch. 610; 31 Digest 439, *5851*; 81 L.J.Ch. 375; 106 L.T. 458.

(6) *Re Lancashire & Yorkshire Bank's Lease, Davis (W.) & Son* v. *Lancashire & Yorkshire Bank*, [1914] 1 Ch. 522; 31 Digest 439, *5853*; 83 L.J.Ch. 577; 110 L.T. 571.

(7) *Gardner* v. *Ingram* (1889), 61 L.T. 729; 31 Digest 446, *5931.*

(8) *Re Brinsmead* (*John*) *& Sons, Ltd.* (1912), 56 Sol. Jo. 253; 31 Digest 439, *5852.*

ORIGINATING SUMMONS by which the plaintiffs asked for an order, under the provisions of the Land Charges Act, 1925, s. 10 (8), that the
A registration, dated June 1, 1934, of a land charge under sect. 10 (*c*) (iv) against certain freehold property might be discharged.

The summons necessitated the construction of an agreement by which an option to purchase the property in question had been granted by the late Mr. E. W. Downes, whose executors the plaintiffs are. The facts
B and the agreement are stated in the judgment.

F. H. L. Errington for the plaintiffs: On the true construction of this particular agreement, the option is to operate for three years from the date it was granted, and the expiration of that time is the end of the three years certain. It may be determined by
C the grantor giving to the grantee twelve months' notice to determine it. By the words "three years certain" is meant that the agreement may be terminated at the expiration of that period. [Counsel referred to *Thompson* v. *Maberly* (1), *Brown* v. *Symons* (2), *Langton* v. *Carleton* (3), *Costigan* v. *Gray Bovier Engines, Ltd.* (4).]

D *George G. Solomon* for the defendant: Notice might be given at the expiration of the term. The word "after" is very strong, and must be construed most strongly against the grantor. The words are "after the expiration of that time may be determined by the grantor giving." This means at the end of the term
E or at any later date. The use of the word "after" must mean that the term continues. How long it will continue must depend upon when notice is given. [Counsel referred to *Re Searle, Brooke* v. *Searle* (5), *Re Lancashire & Yorkshire Bank's Lease, W. Davis & Son* v. *Lancashire & Yorkshire Bank* (6), *Gardner* v. *Ingram* (7), *Re John Brinsmead & Sons,*
F *Ltd.* (8), and *Thompson* v. *Maberly* (1).]

Errington, in reply.

CROSSMAN, J.: This is an interesting question of construction, although the document is a very informal one. It arises on a summons
G to vacate a land charge. The plaintiffs, who are the executors of a Mr. E. W. Downes, ask that a land charge which was registered by a Mr. S. Lobbs may be vacated, on the ground that the contract on which it was registered has ceased to be operative. The application is made under the Land Charges Act, 1925, s. 10 (8), and all I have to consider is whether
H the land charge is something which has any effect at the present time.

On May 22, 1934, Mr. Edgar Walker Downes, who was a farmer, gave to Mr. Sydney Lobbs, who was an estate agent, an option to purchase, and by an agreement in writing made between them it was provided:

> Whereby in consideration of the sum of 10*s*. paid by the said Sydney Lobbs to the said Edgar Walker Downes . . . it was agreed: (i) the grantor grants and gives

to the grantee the sole option of sale and/or purchase of the land owned by him or which he may hereafter be possessed of or entitled to situate at Barton-under-Needwood. The price at which the grantee shall have the option shall be 1*s*. 6*d*. per square yard to be taken in plots at the discretion of the grantee.

There is no question as to the meaning of cl. (i), but cl. (ii) provides:

(ii) the option shall operate for three years certain from the date hereof and after the expiration of that time may be determined by the grantor giving to the grantee twelve months' notice to terminate at the expiration of the said term or at any later date. A

It is upon those four lines that the question which has been argued before me arises. The grantee registered the land charge on June 1, 1934, in respect of the right which he acquired under that agreement. B Mr. Sydney Lobbs died in 1935, and the defendant has taken a grant of administration of his estate. On Mar. 12, 1936, Mr. Edgar Walker Downes died, and his will was proved by the plaintiffs on July 10, 1936. On Apr. 24, 1936, a notice was given by the plaintiffs purporting to determine the option to purchase on May 22, 1937, that is to say, at the C expiration of the three years certain. The defendant said that that had no effect, because a notice could not be given determining the option until some time after the expiration of the three years, and in fact, therefore, the option must be for four years. The plaintiffs, on the other hand, say that the clause means that the option may be brought to an D end at the end of three years, or at any subsequent time, by the giving of twelve months' notice to terminate it. The question is not one in regard to which I can rely upon any authority. The cases which have been cited are interesting, and the most interesting are those which point out the meaning of the words, "three years certain." But none E of the cases cited contains the exact words which have been used here, and I do not think that I can treat them as anything more than as affording some guidance. Mr. Errington says that the words mean before or after, and he says that that is so is shown by the subsequent words, "or any later date." If the notice is to determine at the end of F the three years, it must be given before the expiration of the term. His argument comes to this. The words "after the expiration of that time" must be read as the time when the agreement may expire, and not as the time of the giving of the notice. Mr. Tomlin, for the defendant, put his case in this way, namely, that "giving to the grantee twelve G months' notice" should be read as giving twelve months' notice to the grantee after the expiration of the three years.

I have to choose between the two constructions, each of which, to some extent, involves the turning round of words of the agreement. On the whole, I have come to the conclusion that the proper construction is H that contended for by Mr. Errington, and that I ought to read the words as meaning that the agreement should operate for three years certain, although notice to terminate it could be given after the expiration of that time, that is, when the period has elapsed. There is, therefore, nothing in the words immediately following the words "for three years certain", and that, I think, is borne out and supported by the subsequent words, "giving to the grantee twelve months' notice to terminate at the expiration of the said term." As the agreement has now come to an end, and proper notice has been given, I make an order that the land charge be vacated, and that the defendant pay the plaintiffs' costs of this summons.

Solicitors: *Bridges, Sawtell & Co.*, agents for *G. E. Lowe & Son*, Burton-on-Trent (for the plaintiffs); *Savage Cooper & Wright*, agents for *R. W. Skinner*, Burton-on-Trent (for the defendant).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

R. *v.* WARN.

[COURT OF CRIMINAL APPEAL (Lord Hewart, L.C.J., Humphreys and du Parcq, JJ.), **November 10, 1937.**]

Criminal Law—Sentence—Taking into account other charges—Charges beyond the jurisdiction of the court passing sentence.

The prisoner was convicted at quarter sessions of theft. In passing sentence, there was taken into account a charge of forgery and a charge of obtaining money by false pretences in Ireland:—

HELD: as the court of quarter sessions had no jurisdiction to try the charge of forgery, and no jurisdiction over the offence committed in Ireland, it was wrong to purport to take into account such charges.

[**EDITORIAL NOTE.** The restriction here stated upon the taking into account of other charges does not appear to have been noticed before.

AS TO TAKING OTHER CHARGES INTO ACCOUNT, see HALSBURY, Hailsham Edn., Vol. 9, p. 258, para. 365; and FOR CASES, see DIGEST, Vol. 14, pp. 472, 473, Nos. 5070-5103.]

APPLICATION for leave to appeal.

No counsel appeared.

DU PARCQ, J. (delivering the judgment of the court): This appellant, Arthur Warn, pleaded guilty at the Warwickshire quarter sessions before the deputy chairman to an indictment which charged him with larceny. His offence consisted of stealing a suitcase of some value. He stole the suitcase at a railway station in Birmingham, tore the label off it, and went by train to Rugby, where he was detained and he admitted the theft. The deputy chairman was right in regarding that as a serious offence, and sentenced him to 3 years' penal servitude. There is a large number of previous convictions, the appellant being a man of 54 years of age. In 1913 he was sentenced as a habitual criminal to 5 years' penal servitude and 5 years' preventive detention, and, looking at the record which he has, and at the nature of the offence to which he pleaded guilty, the court is of the opinion that the sentence of 3 years' penal servitude which was passed is not one of which the appellant is entitled to complain.

There is this, however, to be said. It is quite true, and a point is made of it in the notice of appeal, that the deputy chairman, in sentencing the appellant, purported to take into consideration an offence of forgery which the court of quarter sessions had no jurisdiction to try, and also an offence of obtaining money by false pretences, which came within the jurisdiction of the court of Ireland, and which could not be dealt with by the court before which the appellant had come. It is, perhaps, a little curious that the appellant should complain of this, as his counsel, at his request, asked the deputy chairman to take them into consideration. But they were cases which the court plainly had no power to take into consideration, and, therefore, no court ought to purport to take into consideration cases which it has no jurisdiction to try. A court of quarter sessions should not purport to take into consideration cases which are only cognisable at assizes, and no English court should purport to take into consideration cases which are only cognisable in another country. The application is refused.

Application refused.

Solicitor: *Registrar of the Court of Criminal Appeal.*

[*Reported by* Reginald Townsend, Esq., *Barrister-at-Law.*]

SOLLOWAY *v.* McLAUGHLIN. McLAUGHLIN *v.* SOLLOWAY.

[Privy Council (Lord Atkin, Lord Macmillan, Lord Wright, Lord Maugham), **July 15, 16, 20, 22, October 29, 1937.**]

Privy Council—Canada—Stock Exchange—Purchase on margin—Client never in default—Account closed—Broker selling shares on receipt and purchasing on account being closed—Measure of damages.

The respondent, in Oct., 1929, instructed the firm of Solloway Mills & Co., Ltd. (Ontario incorporation), of which the appellants were directors, to purchase on margin 7,000 shares in a mining company. At the same time, he deposited 3,500 shares of the same stock as collateral security, and duly received a contract note purporting to show that the transaction had been carried out. The shares declined steadily in value, and, at the request of the company for further margin on cash, he deposited with them a further 10,500 shares of the same stock, and paid $8,000 cash. He received monthly statements, showing the shares as being carried for him. In Jan., 1930, he decided to close the account, and paid to the company what appeared to be the balance against him on that date, a sum of $42,334.92. The company delivered to him 21,000 shares, i.e., 7,000 originally bought, 3,500 originally deposited, and 10,500 subsequently deposited. The company in fact sold both the original shares and those deposited as soon as it received them, and, upon the closing of the account, bought shares in the market to fulfil its obligation to the plaintiff. As the shares had continually fallen in value over the whole period, the company thereby made a considerable profit. The question on appeal was the amount of damages the plaintiff was entitled to receive:—

Held: the plaintiff was entitled to treat the sale of the shares as a conversion of them, and was therefore entitled to receive the value of the shares upon the day on which they were converted, subject only to bringing into account the value of the shares he received, this value being taken as at the time he received the shares.

Judgment of the Supreme Court of Canada ([1936] S.C.R. 127) *and of the Court of Appeal of Ontario* ([1934] O.R. 464) *set aside.*

[**EDITORIAL NOTE.** In the circumstances of this case, the brokers only held the shares with a power to deal with them if the client made default in supplying sufficient margin. As the latter at all times fulfilled his obligations in this respect, the disposal of the shares amounted to a conversion of them, with the result that the client was entitled to the proceeds of such sale. On the other hand, the client having received, upon the account being closed, similar shares from the brokers, the law requires him to account for these shares only at their value when he received them.

As to Damages and Conversion, see HALSBURY, 1st Edn., Vol. 27, Trover and Detinue, pp. 910, 911, paras. 1603-1606; and for Cases, see DIGEST, Vol. 43, p. 525, Nos. 622, 623.]

Cases referred to:

(1) *Edmondson* v. *Nuttall* (1864), 17 C.B.N.S. 280; 43 Digest 521, *586*; 34 L.J.C.P. 102.

(2) *Fouldes* v. *Willoughby* (1841), 8 M. & W. 540; 43 Digest 472, *116*; 10 L.J.Ex. 364.

(3) *Harvey* v. *Pocock* (1843), 11 M. & W. 740; 18 Digest 368, *1090*; 12 L.J.Ex. 434; 1 L.T.O.S. 290.

(4) *Burn* v. *Morris* (1834), 2 Cr. & M. 579; 42 Digest 996, *236*; 3 L.J.Ex. 193.

(5) *Langton* v. *Waite* (1868), L.R. 6 Eq. 165; 42 Digest 810, *183*; 37 L.J.Ch. 345; 18 L.T. 80; *on appeal* (1869), 4 Ch. App. 402.

(6) *Buckland* v. *Johnson* (1854), 15 C.B. 145; 43 Digest 531, *667*; 23 L.J.C.P. 204; 23 L.T.O.S. 190.

(7) *Smith* v. *Baker* (1873), L.R. 8 C.P. 350; 43 Digest 536, *711*; 42 L.J.C.P. 155; 28 L.T. 637.

(8) *Scarf* v. *Jardine* (1882), 7 App. Cas. 345; 21 Digest 224, *577*; 51 L.J.Q.B. 612; 47 L.T. 258.

(9) *Codling* v. *Mowlem (John) & Co., Ltd.*, [1914] 3 K.B. 1055; 36 Digest 137, *906*; 83 L.J.K.B. 1727; 111 L.T. 1086.

(10) *Solloway* v. *Johnson*, [1934] A.C. 193; Digest Supp.; 103 L.J.P.C. 49; 150 L.T. 421.

(11) *Moon* v. *Raphael* (1835), 2 Bing. N.C. 310; 43 Digest 522, *597*; 5 L.J.C.P. 46.

(12) *Re North Australian Territory Co., Archer's Case*, [1892] 1 Ch. 322; 9 Digest 488, *3201*; 61 L.J.Ch. 129; 65 L.T. 800.

(13) *John* v. *Dodwell & Co.*, [1918] A.C. 563; 43 Digest 535, *705*; 87 L.J.P.C. 92; 118 L.T. 661.

(14) *Rice* v. *Reed*, [1900] 1 Q.B. 54; 43 Digest 536, *712*; 69 L.J.Q.B. 33; 81 L.T. 410.

(15) *Refuge Assurance Co., Ltd.* v. *Kettlewell*, [1909] A.C. 243; 35 Digest 71, *690*; 78 L.J.K.B. 519; 100 L.T. 306; *affg.*, [1908] 1 K.B. 545; 77 L.J.K.B. 421; 97 L.T. 896.

(16) *Glenwood Lumber Co., Ltd.* v. *Phillips*, [1904] A.C. 405; 43 Digest 498, *377*; 73 L.J.P.C. 62; 90 L.T. 741.

Appeal and cross-appeal from a judgment of the Supreme Court of Canada (Sir Lyman Poore Duff, C.J., Lamont, Cannon, Crocket and Dysart, JJ.), dated Feb. 28, 1936, allowing in part the respondent's appeal from a judgment of the Court of Appeal of Ontario (Mulock, C.J.O., Riddell, Middleton, Davis, JJ.A., Macdonnell, J.A., dissenting), dated June 5, 1934, allowing the appellants' appeal from a judgment of the Supreme Court of Ontario (Kerwin, J.), dated June 13, 1933, which, confirming but varying the report of an assistant master, had awarded damages and interest amounting to $55,922.98. By the judgment of the Supreme Court of Canada, the judgment of the Supreme A Court of Ontario, awarding damages against the appellants, had been restored, the amount of such damages and interest being $32,569.44. The facts of the case are set out in the judgment of their Lordships delivered by Lord Atkin.

Cyril Radcliffe, K.C., *Wilfrid Barton, K.C.*, and *R. I. Ferguson*, for B the appellants, referred to *Langton* v. *Waite* (5), *Buckland* v. *Johnson* (6), *Smith* v. *Baker* (7), *Scarf* v. *Jardine* (8), *Codling* v. *John Mowlem & Co., Ltd.* (9), *Solloway* v. *Johnson* (10), *Moon* v. *Raphael* (11).

J. C. McRuer, K.C., and *F. A. Brewin*, for the respondent, referred to *Re North Australian Territory Co., Archer's Case* (12), *John* v. *Dodwell* C *& Co.* (13), *Rice* v. *Reed* (14), *Refuge Assurance Co., Ltd.* v. *Kettlewell* (15), *Glenwood Lumber Co., Ltd.* v. *Phillips* (16).

In the course of the arguments of counsel, *Edmondson* v. *Nuttall* (1) was referred to by Lord Atkin, and *Burn* v. *Morris* (4) by Lord Maugham.

D

Lord Atkin: These are an appeal and a cross-appeal from decisions of the Supreme Court of Canada in an action brought in the High Court of Ontario by the present respondent against two companies named Solloway Mills & Co., Ltd., one registered in Ontario and the other in the Dominion, and against the present appellants, Mr. Isaac Solloway E and Mr. Harvey Mills, two of the directors of the companies. The action was tried before an assistant master, Mr. Lennox, who reported that there was due to the plaintiff from the Ontario company and the appellants the sum of $65,129.92. The Dominion company had dropped out of the proceedings. On appeal by the present appellants from the F master's report, Kerwin, J., confirmed the report, with an arithmetical correction of the amount found to be due to $55,922.98. On appeal, the Court of Appeal dismissed the action as against the present appellants, Macdonnell, J.A., dissenting. On appeal by the plaintiff, the Supreme Court allowed the appeal, but reduced the amount of the judgment to G $28,281.40 and interest. The two director defendants appeal, and the plaintiff cross-appeals.

The claim of the plaintiff arose out of transactions which he had with the Ontario company in 1929 and in 1930. The company purported to carry on business as stockbrokers, having in 1928 acquired the business H of that nature started by the two appellants in 1927. The company were members of the Standard Stock and Mining Exchange in Toronto. On Oct. 16, 1929, the plaintiff instructed the company to buy for him 7,000 shares of Sudbury Basin Mines, Ltd., on margin at market price, then $7 a share. At the same time, he deposited 3.500 shares of Sudbury

Basin Mines, Ltd., as margin. He duly received a contract note purporting to show that the transaction had been carried out in accordance with the rules of the appropriate stock exchange, which in the present case was the Standard Stock and Mining Exchange in Toronto. The shares steadily declined in value. Requests were made from time to time by the company for further margin or cash, and the plaintiff duly complied with these requests, so that, in the course of the transactions between October and December inclusive, he deposited with the company a further 10,500 shares of the Sudbury Co., and paid $8,000 cash. He received monthly statements showing the shares as being carried for him. On Jan. 13, 1930, the plaintiff decided to close the account. The balance against him on that date appeared to be $42,334.92. He paid that sum, and was given delivery of 21,000 shares, i.e., 7,000 originally bought, 3,500 originally deposited, and 10,500 subsequently deposited. It now appears that the transactions, as far as the company were concerned, were part of a fraudulent system of business, and were themselves fraudulent in their inception, continuance and completion. The company purporting to buy, and in fact making valid contracts of purchase, for their clients contemporaneously sold shares of the same company, and used their client's shares to complete these sales. The shares are in the form familiar in American companies, and, with a blank transfer indorsed, pass in a similar manner to bearer shares. A broker is not considered to be under an obligation to retain for his client the specific shares which may be delivered to him under the contract made for his client, but he has, of course, to get into his possession and retain an equivalent number of shares. Under the fraudulent system of the company, they were, throughout the course of this transaction, "short" of these Sudbury Basin shares by about 100,000 shares, involving, no doubt, similar frauds on other clients. In other words, they were bears when their clients were bulls. They correctly anticipated the fall of the market, and, when their clients demanded the shares, they went into the market and bought them at the fallen price, to their own substantial profit. The same course was adopted with the shares deposited as margin. The company sold them as soon as they were deposited, without any lawful excuse, even if the transaction had been in every other respect regular. When they were claimed by the plaintiff, an equivalent number was bought in the market and delivered to the plaintiff, with further profit to the company. It was disputed that the two appellants were parties to the fraud. Their Lordships agree with the assistant master, KERWIN, J., and MACDONNELL, J.A., and the judges of the Supreme Court, that it was established that both the appellants were privy to, and took part in, the fraud throughout. They find it unnecessary to discuss this contention.

What, then, are the rights of the plaintiff in this state of facts? The assistant master gave him the full amount at which he had been charged for the 7,000 shares bought, and also the price at which the company

had realised the deposited shares, crediting the defendants with the market value of the shares at the time when they were delivered to the plaintiff. The Supreme Court agreed with the claim so far as it related to the 7,000 shares, but, as to the deposited shares, they took the view that the plaintiff had made his claim in respect of them for secret profits, that he had affirmed the transaction by taking and keeping the shares A
delivered to him when the account was closed, and that, as he had claimed in contract or quasi-contract against the company, he could not claim against the directors unless he had shown against them some perception of the profits, and this he had failed to establish. They therefore reduced the amount of the judgment to the amount charged to the plaintiff for B
the 7,000 shares, less their value when delivered.

Regarded from this point of view, their Lordships have no criticism to pass on the judgment. But the plaintiff before the Board put his claim on a broader basis, which is sufficiently revealed by the pleadings, and which their Lordships are disposed to accept. The company were C
employed as agents. If they had honestly fulfilled their mandate, they would have been entitled, not to the price of the 7,000 shares, but to an indemnity against the price which they had paid to the sellers. But agents who engage in a fraudulent scheme to defraud their principal forfeit their right to an indemnity in respect of transactions which form D
part of the fraud. The company, therefore, were never entitled to an indemnity, and the principal, on discovering the fraud, was entitled to recover back the money paid on the footing of an honest transaction, giving credit, of course, for any benefit which he received, in this case, the value of the 7,000 shares at the time he received them. As to the E
deposited shares, in the circumstances of the case, the company never had any right to deal with them. If the transaction had been originally honest, the company would have had only a special property, which, on the facts of the case, even had the transaction been honest throughout, would not have given them the right to dispose of the shares, for there F
never had been default. But, on the actual facts of a mandate, accepted for the express purpose of being fraudulently misused by the agent, the agents never had the right to claim or to hold security, still less to dispose of it. Their disposal of the deposited shares amounted to nothing short of conversion, and the client, on each occasion on which the shares were G
sold, had vested in him a right to damages for conversion, which would be measured by the value of the shares at the date of the conversion. How, then, is his position affected by the fact that, not knowing of the conversion, he received from the wrongdoer, and has retained, the very goods converted, or their equivalent? It appears to their Lordships H
that the only effect is that he must give credit for the value of what he has received at the time he received it, and that the damages are reduced by this amount. In *Edmondson* v. *Nuttall* (1) the plaintiff had placed his looms with the defendant, who was to supply standing room and power in his mill. The plaintiff demanded the return of his looms,

the defendant refused (thereby being guilty of conversion), and the next day the goods were seized, and subsequently sold under an execution from the county court on a judgment obtained by the defendant against the plaintiff. The question was whether the fact that the liability of the plaintiff on this judgment had been apparently satisfied by the seizure A and sale of the looms could be taken into account in estimating damages for the conversion. The Court of Common Pleas, WILLIAMS, WILLES and BYLES, JJ., decided against the defendants, and WILLES, J., said, at p. 294:

> B The measure of damages for the conversion of goods is *prima facie* their value. . . . Then, there is the case in which the goods wrongfully seized have been afterwards returned. The cases of *Fouldes* v. *Willoughby* (2), and *Harvey* v. *Pocock* (3), afford a familiar illustration of the rule. The circumstances I have referred to have from very early times been considered admissible in mitigation of damages, because the plaintiff has had part satisfaction for the wrong. If the goods have been restored, and the plaintiff has consented to take them back in discharge of the claim, that might perhaps be pleaded by way of accord and satisfaction; if not, it C would go in reduction of the amount of damages to which the plaintiff would be entitled for the wrongful conversion.

It does not require argument to show that the amount by which the damages are reduced must be the value of the goods when returned. In the result, therefore, the plaintiff appears to be entitled to retain the D sum for which he recovered judgment under the order of KERWIN, J. It is objected that this will be to put him in a better position than that in which he would have been if he had not been defrauded at all, and this appears to have influenced the decision of the majority of the Court of Appeal in Ontario. All that this amounts to is to recognise that fraudu- E lent brokers often have sounder judgment as to the future course of markets than have their clients. If the shares had been converted and not returned, there can be no question that the client would have been entitled to receive the proceeds of the conversion, though he himself had planned to, and thought he had succeeded in, holding the shares F until a time when the value was nothing. Fortunately for the commercial community, the law has many effective forms of relief against dishonest agents, and no injustice is done if the principal benefits, as he occasionally may, by the superior astuteness of an unjust steward in carrying out a fraud.

G In the course of the case a point has been made that the assistant master, under the Acts and rules of procedure in Ontario, had no jurisdiction to entertain this case. It has not met favour in any of the courts below. In the Supreme Court, though it is mentioned in the factums, either it was not argued or it met with little approval, for it is H not mentioned in the judgment. Their Lordships see no reason for interfering with the judgment on this ground.

The appeal will be dismissed and the cross-appeal will be allowed. The judgment of KERWIN, J., dated June 13, 1933, should be restored, and the respondent should have the costs of the appeal to the Court of Appeal in Ontario and to the Supreme Court. The appellants must pay the costs of the appeal and cross-appeal to His Majesty in Council. Their Lordships will humbly advise His Majesty accordingly.

Appeal dismissed and cross-appeal allowed. Judgment of the Supreme Court of Ontario restored. Respondent to have the costs of the appeal to the Court of Appeal in Ontario and to the Supreme Court. Appellants to pay the costs of the appeal and cross-appeal to His Majesty in Council.

Solicitors: *Gard, Lyell & Co.* (for the appellants); *Lawrence Jones & Co.* (for the respondent).

[*Reported by* T. A. DILLON, ESQ., *Barrister-at-Law.*]

DOXFORD & SONS, LTD. *v.* FURNESS SHIPBUILDING CO., LTD.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Romer and MacKinnon. L.JJ.), **November 9, 1937.**]

Workmen's Compensation—Proceedings against stranger—Indemnity—Loan of workman—"Employer"—"Person other than the employer"—Workmen's Compensation Act, 1925 (*c.* 84), *ss.* 5, 30.

The applicants were engaged in fitting Diesel engines in a vessel in the respondents' yard. As the work was urgent, they borrowed three of the respondents' workmen. One of the latter dropped a hammer and injured an employee of the applicants. The applicants paid the injured man compensation and sought to be indemnified by the respondents. The latter contended that, by reason of the definition of "employer" in sect. 5 of the 1925 Act (whereby, upon the loan of services of a workman, the person with whom he has entered into a contract of service is to be deemed to be, and to continue to be, his employer) the respondent company was the employer within the meaning of sect. 30 of the Act and that therefore the injury was not caused in circumstances creating a legal liability in some person other than the employer as required by that section:—

HELD: (i) the "legal liability in some person other than the employer" referred to in sect. 30 was a liability outside the Act, and it was not legitimate to refer to the definition in sect. 5 of the Act in the way contended.

(ii) the construction of the section was the same whether the right to an indemnity was sought to be enforced by an arbitration under the Act or by action.

[**EDITORIAL NOTE.** The Workmen's Compensation Act, 1925, s. 30, provides that an employer who has paid compensation to the injured workman may claim an indemnity from a "person other than the employer" who would be liable to be sued by the workman. It was attempted in this case to import the definition of employer in sect. 5 into sect. 30 and so make it impossible to obtain an indemnity from the employer of a servant lent to the firm for whom the injured workman was working. By sect. 5 the actual master of the loaned workman is his employer at all times for the purposes of the Act; but the words in sect. 30 are dealing with liability outside the Act, and in such a case it was held to be wrong to import the definition from sect. 5.

AS TO RIGHT TO INDEMNITY, see HALSBURY, 1st Edn., Vol. 20, Master and Servant, p. 220, para. 504; and FOR CASES, see DIGEST, Vol. 34, pp. 496, 497, Nos. 4094-4106. See also WILLIS'S WORKMEN'S COMPENSATION, 30th Edn., pp. 464-470.]

APPEAL from an award, dated June 3, 1937, and made in an arbitration under the Workmen's Compensation Act before HIS HONOUR JUDGE RICHARDSON in the Sunderland county court.

W. Shakespeare for the appellants.

J. Alun Pugh for the respondents.

SIR WILFRID GREENE, M.R.: This is an appeal from a decision of the county court judge in the Sunderland county court. The question arises under the Workmen's Compensation Act, 1925, s. 30, which gives to an employer, who has paid compensation, a right of indemnity, in certain circumstances, against a third party. The applicants are William Doxford & Sons, Ltd., and they were engaged in fitting Diesel engines to a motor vessel which had been built by the respondents, the Furness Shipbuilding Co., Ltd., in their yard. The vessel, at the time of the accident, was in the yard of Doxford's, and, while they were fitting the Diesel engines, certain work had to be performed by the shipbuilders, the Furness Shipbuilding Co., Ltd. In order to enable them to perform that work, which was of an urgent nature, they borrowed from Doxford's a squad of three men, two apprentices, Owen and Preece, and a heater. The work in question involved erecting the casing top after the engines went into the ship. While they were performing that work, Preece let fall a hammer, and that hammer hit Hepple, who was working below, Hepple being a man who was in the employment of Doxfords. In view of the decision at which the county court judge arrived as to the effect of sect. 30 coupled with sect. 5 of the Act, it was not necessary for him to decide the question whether there was any negligence on Preece's part. Sect. 30 provides as follows:

> Where the injury for which compensation is payable under this Act, or any scheme certified under this Act, was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof, (1) the workman may take proceedings both against that person to recover damages and against any person liable to pay compensation under this Act or such scheme for such compensation, but shall not be entitled to recover both damages and compensation; and (2) if the workman has recovered compensation under this Act or such scheme, the person by whom the compensation was paid, and any person who has been called on to pay an indemnity under sect. 6 of this Act relating to liability in case of workmen employed by contractors, shall be entitled to be indemnified by the person so liable to pay damages as aforesaid, and all questions as to the right to and amount of any such indemnity shall, in default of agreement, be settled by action, or, by consent of the parties, by arbitration under this Act.

Hepple claimed compensation from Doxfords, his employers. That compensation was paid, and Doxfords claim to be entitled to an indemnity against the Furness Shipbuilding Co., Ltd. It is in respect of what they have paid Hepple, or may be liable to pay in future, that these proceedings are brought. The particular procedure adopted was arbitration under the Act. I will deal at once with one suggestion that was made, namely, that the Act might have a different operation upon the question we have to deal with according to whether the particular mode of procedure was by action or by arbitration. In my opinion, that suggestion is quite without foundation. The true construction and effect of the section are the same, whatever form of procedure is adopted. It is said that sect. 30 must be construed in relation to sect. 5, and the county court judge has held that the result of that process is to negative Doxford's claim. Sect. 5 (1) is a definition section, which defines employer. It says :

A

> In this Act unless the context otherwise requires the expression "employer" includes any body of persons corporate or unincorporate and the legal personal representative of a deceased employer, and, where the services of a workman are temporarily lent or let on hire to another person by the person with whom the workman has entered into a contract of service or apprenticeship, the latter shall, for the purposes of this Act, be deemed to continue to be the employer of the workman whilst he is working for that other person.

B

That section, of course, does not have any relevant effect so far as regards the relationship of Hepple to Doxford, since Hepple was unquestionably an employee of Doxford's, but it is said to have a result of a remarkable character when the question of Preece's position is considered. If we put sect. 5 on one side for the moment, and look at sect. 30, as it stands, C and read it according to its ordinary meaning, the first question which arises is this : Was the injury caused in circumstances creating in some person other than the employer a legal liability to pay damages in respect thereof ? The employer of Hepple was Doxford. If it be assumed that there was negligence on Preece's part, then the injury was caused D in circumstances creating a legal liability in Preece's employers, whoever they might be. The first point that is taken by Mr. Pugh is that the Furness Shipbuilding Co., Ltd., were not the employers of Preece, and that, therefore, no question of a legal liability in that company in respect of this accident could arise. I need say no more about that E argument, except that the judge's conclusions of fact, relevant to that matter, are conclusions for which there was ample evidence before him, and those conclusions of fact, in my opinion, he rightly treated as making the relationship between the Furness Shipbuilding Co., Ltd., and Preece the relationship of employer and employed, for the purpose of deter- F mining liability for negligent actions on the part of Preece. On that part of the judge's judgment I have no criticism to make.

That being so, turning back to sect. 30, there is a legal liability in the Furness Shipbuilding Co., Ltd., to pay damages to Hepple in respect of the accident. Accordingly, Hepple had the right under sect. 30 (1) G to take proceedings both against the Furness Shipbuilding Co., Ltd., to recover damages, and against Doxford's for compensation, but he could not get both. Under sect. 30 (2), if Hepple has recovered compensation under the Act (as he has), the person by whom the compensation was paid—to wit, Doxford's—shall be entitled to be indemnified H by the person so liable to pay damages as aforesaid, that is to say, the Furness Shipbuilding Co., Ltd., who were the people liable to pay damages to Hepple by reason of the negligence of their servant Preece. That construction not only gives effect to the natural meaning of the words, but also leads to a provision perfectly sensible and reasonable

for the legislature to have made. But it is said (and the judge has so decided) that, when one looks at the definition section of the Act, the section defining employer, sect. 5, and finds that Preece was temporarily lent on hire by Doxford's to the Furness Shipbuilding Co., Ltd., the question of the relationship between Preece and the Furness Shipbuilding
A Co., Ltd., is not a matter into which the court can inquire, because the language of sect. 5 clearly establishes that Preece is the servant of Doxford. It is then said that, if Preece is the servant of Doxford for the purposes of the Act, and sect. 5 says so, he cannot be the servant of the Furness Shipbuilding Co., Ltd., and, therefore, there never could
B be any question of Hepple's bringing an action for damages against the Furness Shipbuilding Co., Ltd., in respect of the negligence of Preece. With all respect, I cannot follow that reasoning. The one thing which I should have thought was certain, to begin with, was that Hepple could have brought an action against the Furness Shipbuilding Co., Ltd.,
C for damages for negligence once it was established that Preece was the servant of the Furness Shipbuilding Co., Ltd., as I have held he was, and that, once negligence was established, he could recover damages. The Workmen's Compensation Act would have nothing to do with a claim of that character. It would be quite outside the Act, and it would be
D irrelevant to look at the Act in an action of that sort. The fact that Hepple could have brought such an action clearly brings the case, in my judgment, within the words, "circumstances creating a legal liability in some person other than the employer." Indeed, sect. 30 (1) makes it clear that the workman Hepple could have brought proceedings
E against the Furness Shipbuilding Co., Ltd. Once that is realised, it becomes quite impossible to treat the question of legal liability in the other person as a thing to be decided by reference to sect. 5, on the ground suggested, namely, that, once an employer, for the purpose of the Act, is ascertained, it is not legitimate to show that, for purposes
F outside the Act, namely, an action outside the Act, somebody else would be liable. I cannot give any such force to sect. 5. It seems to me clear that, where some other person, by reason of his position as employer, is under a legal liability outside the Act, the question as to who is the employer under the Act cannot possibly affect the matter.
G In my opinion, therefore, the judge was wrong in deciding, as he did, that Preece cannot be treated as the servant of the Furness Shipbuilding Co., Ltd., for this purpose. The matter must go back to the county court judge to be dealt with on that basis.

H Romer, L.J.: The first question the judge had to determine was whether the Furness Shipbuilding Co., Ltd., were under any legal liability to the injured workman, Hepple. For the purpose of determining that question, the judge had nothing whatever to do with any particular meaning which may have been given to the word "employer" or "workman" under the Workmen's Compensation Act, 1925. He had to decide that question without any reference whatsoever to that Act. Having determined that question, and having come to the conclusion to which he did come, that there was such legal liability, then it appears to me that the plain words of sect. 30, not giving to every word in sect. 30 any special meaning, for the purpose of the Act, show that the applicants were entitled to the indemnity. The amount of such indemnity is a A matter which will have to be determined by the county court judge. In the circumstances, I agree that this appeal must be allowed, and that it must go back to the county court judge for the purpose of ascertaining whether Preece was guilty of any negligence, because, if he comes to the conclusion that there was negligence, then, having regard B to the findings of fact to which SIR WILFRID GREENE, M.R., referred, the Furness Shipbuilding Co., Ltd., would be under a legal liability to Hepple.

MACKINNON, L.J.: I agree. Mr. Pugh's contention seems to me C to be quite unarguable. The section talks about a claim against a person who is some person other than the employer. The suggestion of the county court judge is that one cannot claim against anybody other than the employer. But the section in terms speaks of a claim against some person other than the employer. D

Appeal allowed with costs of appeal. Case remitted to county court.

Solicitors: *Crossman, Block & Co.*, agents for *Dees & Thompson*, Newcastle-upon-Tyne (for the appellants); *Tarry, Sherlock & King*, agents for *Cohen, Jackson & Scott*, Stockton-on-Tees (for the respondents).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*] E

MORLEY (INSPECTOR OF TAXES) *v.* TATTERSALL.

[KING'S BENCH DIVISION (Lawrence, J.), **October 26, 27, 28, November 5, 1937.**]

Income Tax—Unclaimed balances—Carried into partners' current accounts—Trade receipt—Subsequent payment—Deduction.

A firm of auctioneers by their conditions of sale provided that vendors should receive the purchase money on the Monday week following the sale, and that no money would be paid or remittance sent by post without a written order. As a result of the operation of these conditions, large sums of money from time to time remained unclaimed in the hands of the firm. Upon the admission of a new partner in 1908, £13,022 6*s.* 4*d.* in respect of unclaimed balances was transferred to the capital account of the old partner; and in 1935, upon the admission of a further partner, £10,406 10*s.* 1*d.* was transferred to the current accounts of the former partners. A partnership deed in 1936 provided that such liability as subsisted in respect of these sums should be assumed by the partnership, that such unclaimed balances as first arose 6 years before the taking of each annual account should be transferred at such account to the credit of the partners in accordance with their shares in the partnership, that all liablity in respect thereof should be borne by the partnership, but that the liability of the partnership should not appear in the annual general accounts:—

HELD: the unclaimed balances so received, although a contingent liability attached to them, were trading receipts, and were liable to income tax as such; and any payment made in respect of an unclaimed balance should be treated as a proper debit against the profits of the year in which it was made.

[**EDITORIAL NOTE.** The position of unclaimed balances in respect of income tax must to some extent be dependent upon the method of treatment adopted with regard to them. So long as they are kept in a suspense account, no question of income tax arises. If they are brought into the current account of the business, they will then attract income tax, although they may have to be repaid. If they are repaid, they are to be treated as a deduction against profits.

AS TO TRADE RECEIPTS, see HALSBURY, Hailsham Edn., Vol. 17, pp. 95, 96, para. 190; and FOR CASES, see DIGEST, Vol. 28, pp. 17-21, Nos. 87-107.]

Cases referred to:

(1) *Cronk (John) & Sons, Ltd.* v. *Harrison* (1935), 153 L.T. 366; Digest Supp.; *affd.*, [1936] 3 All E.R. 747; 20 Tax Cas. 612; [1937] A.C. 185; 106 L.J.K.B. 70; 156 L.T. 20.

(2) *Smart* v. *Lincolnshire Sugar Co., Ltd.* (1935), 154 L.T. 167; Digest Supp.; *affd.*, [1937] 1 All E.R. 413; 20 Tax Cas. 643; [1937] A.C. 697; 106 L.J.K.B. 185; 156 L.T. 215.

(3) *Cowen (B. D.) (Trading as Ideal Trading Stamp Co.) & Cowen's Ideal Trading Stamp Co. (Glasgow), Ltd.* v. *Inland Revenue Commissioners* (1934), 19 Tax Cas. 155; Digest Supp.

(4) *Lambert Bros., Ltd.* v. *Inland Revenue Commissioners* (1927), 12 Tax Cas. 1053.

(5) *Taxes Commissioner* v. *Melbourne Trust, Ltd.*, [1914] A.C. 1001; 28 Digest 18, case *92 i*; 84 L.J.P.C. 21.

CASE STATED for the opinion of the court by the commissioners for the special purposes of the Income Tax Acts under the Income Tax Act, 1918, s. 149. The facts and arguments are fully set out in the judgment.

The Solicitor-General (*Sir Terence O'Connor, K.C.*,) and *Reginald P. Hills* for the appellant.

A. M. Latter, K.C., and *Cyril King, K.C.*, for the respondents.

LAWRENCE, J.: The question in this case is whether certain unclaimed balances in the hands of Messrs. Tattersall, the auctioneers of horses, are trading receipts of their business. The business, which is of considerable antiquity, was being carried on immediately before 1921 by Mr. Somerville Tattersall alone, but, as from Jan. 1, 1921, by a deed of Feb. 23, 1922, he took into partnership Mr. G. H. Deane. It has been the practice of the firm, at any rate since 1847, to include the following condition in their conditions of sale:

> 7. The vendor shall be entitled to receive the purchase money of each lot sold on the Monday week following the sale, provided that the auctioneers shall then have received the purchase money, or delivered the lot out of their custody, but not before. Delivery of a lot by the owner or his agent without a written order from the auctioneers shall not be deemed delivery by the auctioneers within the meaning of this condition. . . . No money paid, or remittance sent by post, without a written order.

As a result of this condition, large sums of money from time to time remained unclaimed in the hands of the firm. When the partnership with Mr. Deane was constituted, the unclaimed balances for years prior to 1908—namely, £13,022 6*s.* 4*d.*—were transferred to Mr. Tattersall's capital account. By a deed of Mar. 23, 1936, Mr. Needham became a partner, as from Jan. 1, 1935, and the unclaimed balances up to Dec. 31, 1928, namely, £10,406 10*s.* 1*d.*, were transferred to and divided between Mr. Tattersall's and Mr. Deane's current accounts, as on Dec. 31, 1934—£9,088 2*s.* 1*d.* to Mr. Tattersall and £1,318 8*s.* to Mr. Deane. The partnership deed of Mar. 23, 1936, provided that such liability as subsisted in respect of the said sums of £13,022 6*s.* 4*d.* and £10,406 10*s.* 1*d.* should be assumed by the partnership; that all such unclaimed balances since Dec. 31, 1928, as first arose 6 years before the taking of each annual account should be transferred at such account to the credit of the partners in accordance with their shares in the partnership; that all liability subsisting in respect of the said unclaimed balances should continue to be borne by the partnership, but that the liability of the partnership in respect of the sums transferred to the partners should not appear in the annual general accounts.

Assessments have been made upon the partnership for the year to Apr. 5, 1933, in a token sum of £2,000 in respect of the unclaimed balances, and for the year to Apr. 5, 1936, in a sum of £6,878, which includes a token sum of £2,000 in respect of unclaimed balances. It was agreed that the second assessment was the only one which need now be considered.

The contention of the Crown is that, when unclaimed balances are transferred to the partners' current accounts, in accordance with the partnership deed, they become trading receipts, and are taxable as such.

The respondents contend that these unclaimed balances are, and always have been, debts of the firm; that debts owed by a firm cannot constitute trading receipts of the firm; that what the firm do among the partners with money which they owe has nothing to do with the character of that money; that, if the balances were brought into the profit and loss account, they would have to be brought in on both sides of the account; that the cases relied on for the Crown—*Cronk (John) & Sons, Ltd.* v. *Harrison* (1), *Smart* v. *Lincolnshire Sugar Co., Ltd.* (2), *Cowen (B. D.) (Trading as Ideal Trading Stamp Co.) & Cowen's Ideal Trading Stamp Co. (Glasgow), Ltd.* v. *Inland Revenue Commissioners* (3)—are distinguishable, because they deal with undoubted trading receipts, the question in each case being whether the receipts should be brought in for the particular year in question with or without a discount on account of a contingency; and that *Lambert Brothers, Ltd.* v. *Inland Revenue Commissioners* (4), at pp. 1067, 1079, was also distinguishable, since the taxpayer there was undoubtedly entitled to the share of the surplus stock fund divided between the government and the taxpayer, whatever his liability for short deliveries of coal might have been to shipowners. In reply, the Solicitor-General contended that the balances arose in the course of the firm's trade; that the liability, until the demand in writing was made, was merely contingent; and that, on the authority of *Taxes Commissioner* v. *Melbourne Trust, Ltd.* (5), at pp. 1010, 1011, the way in which the partnership dealt with the balances gave the final impression of profit to what had formerly been held in suspense, and that therefore the balances, when distributed, became trading receipts. It was not suggested that the cases cited are decisive of the present case, nor was it suggested that I am bound by the finding or opinion of the commissioners that the balances are not trading receipts.

I have come to the conclusion that these balances, when distributed to the partners, are trading receipts, and that, if and when any claim is made thereafter, such claim, if successful, should be treated as a proper debit against the profits of the year in which it is made. The balances arise in the course of the business, and by reason of the conditions laid down by the partnership. It is to be inferred that they arise annually in many years, if not in every year. No immediate liability to pay exists in respect of the balances; the liability is merely contingent. The condition above set out is a contractual, and, therefore, in my view, an essential, part of the respondents' business, and, as a result of that condition, large profits come into their hands. Once it is conceded, as it must be conceded, in view of the authorities, that a receipt in the course of, and arising out of, trade may be a trading receipt for income tax purposes, although a contingent liability attaches to it, I can see no reason why the unclaimed balances which are received in the manner in question in the present case should not be regarded as trading receipts. That these balances should be taxable when distributed is, in my opinion, in accordance with the view of the Judicial Committee of the Privy

Council in *Taxes Commissioner* v. *Melbourne Trust, Ltd.* (5), which has been followed on several occasions.

For these reasons, I am unable to agree with the conclusion of the commissioners, and the case must go back to them to settle the figures. The appeal is allowed with costs.

Appeal allowed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellant); *Baileys, Shaw & Gillett* (for the respondents).

[*Reported by* W. J. Alderman, Esq., *Barrister-at-Law.*]

Re BRIDGEN, CHAYTOR *v.* EDWIN.

[Chancery Division (Clauson, J.), **November 5, 1937.**]

Wills—Construction—Gift to "all my relations"—Rule of convenience—Variation of rule due to the enactment of Administration of Estates Act, 1925 (*c.* 23), *s.* 46.

The testatrix, a spinster, made her will in the following terms: "I wish E. and H. to take possession of all my possessions to be held in trust after my death and divided equally amongst all my relations":—

Held: (i) the gift was a general gift of all the testatrix could bequeath or devise by her will.

(ii) in the rule of convenience that construed a gift to "all my relations" as a gift equally to all those, other than a husband or wife, entitled under the Statutes of Distribution, there must now be substituted all those persons within the class of consanguinity indicated by the Administration of Estates Act, 1925, s. 46. The division between members of the class will still be in equal shares *per capita.*

[EDITORIAL NOTE. The decision will apparently apply to all rules of convenience which refer to the Statutes of Distribution, and brings such rules into line with the provisions of the Administration of Estates Act, 1925, s. 50. It was attempted to restrict the rule to those who would be entitled on an intestacy, but this was thought to be creating a new rule rather than making such variation in the previous rule as recent legislation has made necessary. This case expressly leaves open the point as to whether, under this rule of convenience, infants take absolutely or only contingently.

As to "Relations," see HALSBURY, 1st Edn., Vol. 28, Wills, pp. 757, 758, para. 1391; and for Cases, see DIGEST, Vol. 44, pp. 890-893, Nos. 7473-7515.]

Case referred to:

(1) *Widmore* v. *Woodroffe* (1766), Amb. 636; 44 Digest 890, *7482.*

Adjourned Summons to determine whether the rule of convenience restricting "relations" to those taking under the Statutes of Distribution has been varied as a result of the enactment of the Administration of Estates Act, 1925, s. 46.

D. Ll. Jenkins for the plaintiff.

A. H. Droop for the first and second defendants.

G. E. Strickland for the third defendant.

A. G. Cross for the fourth defendant.

Clauson, J.: The testatrix, who was a spinster, made a very short will in these terms:

> In case of my immediate decease, I wish Ethel and Hilda Harding to take possession of all my possessions to be held in trust after my death and divided equally amongst all my relations.

Ethel and Hilda Harding renounced administration, and administration has been granted to some other person.

I am asked to decide what is the effect of this clause. The first point is, is it a general universal gift of all that the testatrix could bequeath or devise by will ? In my view, it is. By this clause, the whole of the testatrix's property was disposed of, and there is no intestacy.

The next point I have to decide is who are the beneficiaries who take. I will first deal with the question as if I were dealing with it before the recent change in the law effected by the Administration of Estates Act. If I had been dealing with it before that change in the law, my decision would have been as follows. I should first hold that there is no special virtue in the phrase "all my relations." The phrase "all my relations" does not bring in any more extensive class than does the phrase "my relations." I should next decide what the phrase "my relations" means. By reason of the authorities, to which it is not necessary for me to refer, but which are clearly binding upon this court, I should then have decided that the persons who took under this gift would be the persons, other than a husband or wife, who would be entitled to the personal estate of the testatrix by virtue of the Statute of Distributions, had she died intestate. If the court were to read the gift to relations as covering everybody between whom and the testatrix there is a nexus of blood, the result would be to embark upon an inquiry which, at all events in the vast majority of cases, would, as pointed out by Lord Camden, L.C., in *Widmore* v. *Woodroffe* (1), be infinite. Accordingly, the courts have adopted the rule that the word "relations" is to be construed as meaning the persons who would take under the Statute of Distributions. By this particular will, the distribution would be equal; and, accordingly, before the alteration in the law to which I have referred, the persons entitled under the statute would be ascertained, and they would not take in the shares indicated in the statute, but they would take equally.

The law, however, has been changed by the enactment by the legislature of the Administration of Estates Act, which has altered the law in two respects. The first respect is that it confines the persons who can take in the case of intestacy to a comparatively narrow class of relatives, namely, those who are within the degrees of grandparents or descendants of grandparents. The other alteration made is this. The persons who take under the Administration of Estates Act do not necessarily take absolutely, as the persons took who took under the Statute of Distributions; but, as regards such of them as are infants, they take subject to certain contingencies.

What effect has that alteration in the law to have upon my decision of this case ? This seems clear. Whereas before the alteration in the law I should have had to see the persons who took under the Statute of Distributions, I must now at all events, if I apply the same rule as before, take a different class of persons, namely, those indicated as beneficiaries under the Administration of Estates Act. It is suggested, however, that, as the rule adopted by the court before the change in the law was one of convenience only, I can now adopt another rule of convenience suggested by the terms of the Administration of Estates Act, and can define the word "relations" by reference, not necessarily to those who actually would take under the statute in the case of intestacy, but to that limited class of relations recognised by the legislature now as potential beneficiaries of the intestate, namely, those within the degrees of grandparents or grandparents' descendants. It may well be that, if that rule had not been adopted by the courts, and it were necessary now to adopt a rule of convenience, it might be convenient to adopt such a rule ; but in my view I am not free to adopt such a rule. The rule of convenience has been adopted, namely, that "relations" shall be construed as meaning those who take under the Statute of Distributions. The change in the law, while it has the effect of substituting a new class in certain respects, ought not, in my view, to be taken as altering beyond strict necessity the rule of convenience already adopted. I do not see my way to adopt a new rule of convenience, namely, that the term "relations" is to be construed as referring to the persons within the class of consanguinity indicated under the Act as possible beneficiaries in the case of intestacy.

In this particular case no difficulty arises by reason of the fact of any claimant being in a minority. All the possible claimants in the present case are persons who are adult, and, accordingly, the further question does not arise, namely, whether, in the case of distribution among the relations equally, those who, under the Administration of Estates Act could take only contingently, would take the benefit conferred on them by the will contingently or absolutely ; and it is better that I should not prejudge that point.

Solicitors : *Clarke, Rawlins & Co.*, agents for *Waldy, Son, & Chaytor*, Darlington (for the plaintiff) ; *Ravenscroft, Woodward & Co.* (for all the defendants).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

PURVIS *v.* GOOLE STEAM SHIPPING (LONDON, MIDLAND & SCOTTISH RAILWAY).

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Romer and MacKinnon, L.JJ.), **November 4, 1937.**]

Workmen's Compensation—Incapacity—Whether due to accident or refusal to undergo surgical operation—Absence of request by employers—Unreasonable conduct.

A workman, who had been injured in two accidents, was advised by his medical adviser to undergo an operation. He refused so to do, and it was held that such refusal amounted to unreasonable conduct. On appeal it was contended that, for a refusal to constitute unreasonable conduct, it must be a refusal of an offer made by an employer :—

HELD : in considering whether such refusal constituted unreasonable conduct, it is irrelevant whether a suggestion of some surgical operation or treatment comes from an employer or from a workman's own medical adviser.

India Rubber, Gutta Percha & Telegraph Works Co., Ltd. v. *Chapman* (1), *considered.*

[**EDITORIAL NOTE.** This case clears up a doubt concerning a dictum of LORD HANWORTH, M.R., in *India Rubber, Gutta Percha & Telegraph Works Co., Ltd.* v. *Chapman* (1), by which it had been thought that there could only be an unreasonable refusal to undergo an operation, where there had been a request to that effect by the employer to the workman. It is here held that there is no such condition precedent, and that the observations of LORD HANWORTH were made in reference only to the facts of that particular case.

AS TO REFUSAL TO UNDERGO OPERATION, see HALSBURY, 1st Edn., Vol. 20, Master and Servant, pp. 235, 236, para. 557 ; and FOR CASES, see DIGEST, Vol. 34 ,pp. 349, 350, Nos. 2807-2820.]

Case referred to :

(1) *India Rubber, Gutta Percha & Telegraph Works Co., Ltd.* v. *Chapman* (1926), 20 B.W.C.C. 184 ; Digest Supp.

APPEAL by the applicant in an arbitration under the Workmen's Compensation Act from the award of His Honour JUDGE MITCHELL BANKS given at the Goole County Court on May 25, 1937.

SIR WILFRID GREENE, M.R. : This is an appeal from an award made by His Honour JUDGE MITCHELL BANKS sitting in the Goole County Court. The workman had suffered two accidents. The first accident, which took place on Sept. 21, 1926, gave rise to a hernia, and for two weeks he received compensation at the rate of 30*s.* a week during total incapacity, and he afterwards returned to his work wearing a truss. The evidence showed that the work which he could do since the accident was not so heavy as the work he had done before, and the county court judge came to the conclusion that he was still suffering from a temporary incapacity, which was attributable in the first instance to that rupture. On Apr. 29, 1935, he had a second accident. He injured his back in pulling a bag of cement, and he received for a considerable time £1 0*s.* 2*d.* compensation, on the basis of total incapacity, his earnings at that time being lower than they had been at the date of the first accident. That compensation he received except for a short period of a few months when he was doing light work. On Apr. 1, 1937, he applied for arbitration, and his claim was a claim based on both accidents. He claims 14*s.* 8*d.* a week during partial incapacity arising from the first accident, and, in addition, continuance of £1 0*s.* 2*d.* per week during total incapacity arising from the second accident; alternatively, such lesser sum as to the arbitrator may seem just; or, alternatively, a declaration of liability. In their answer, the respondents, while denying the right to compensation, and denying that any existing incapacity resulted from either accident, submitted to a declaration of liability, and then, as one alternative, they alleged that any incapacity arising from the first accident was due to the applicant's unreasonable refusal to undergo a surgical operation for the hernia. The matter was heard by the county court judge on Apr. 27, 1937, and he reserved judgment. On May 25, he made an award in favour of the respondent, that the workman was no longer entitled to compensation in respect of either accident, and he did not get any declaration of liability.

The decision of the judge is attacked, on behalf of the workman, first, on the ground (quite shortly, because it was not really pressed) that the judge ought not to have found, as he did find, that there was no incapacity due to the second accident. In point of fact, the incapacity alleged was due to osteo-arthritis, and it was attempted to establish that this was due to, or was aggravated by, the second accident, which was an accident to his back. On that, the county court judge found against the workman, and it is really impossible to question that ruling; there was evidence upon which he could so decide. The main argument related to the first accident. It was said, in the first place, that, upon the evidence, there was no justification for the county court judge to find, as he did, that the workman had unreasonably refused to undergo an operation, with the result that the present disability was due, and must be attributed, not to the accident, but to that unreasonable refusal. In criticism of that finding, it is said, first, that there was no request by the employer to the workman to undergo an operation for the hernia, and that such a request was necessary before there could be any refusal by the workman. In reliance on that proposition, reference is made to some observations of LORD HANWORTH, M.R., in *India Rubber, Gutta Percha & Telegraph Works, Co., Ltd.* v. *Chapman* (1). LORD HANWORTH, M.R., said, at p. 187:

> What had to be established in the case was, firstly, that there had been an offer on the part of the respondents to provide for the man going into hospital; secondly, that that offer had been unreasonably refused, it being a proper course to be adopted and accepted on the part of the workman, and, thirdly, that but for that refusal the man would have recovered.

Those observations, which were made in reference to the facts of that case, do not, I think, purport to lay down any principle to the effect of that for which Mr. Pugh contends, namely, that no refusal can be effective for this purpose, unless it be a refusal of some offer made by the employer. Indeed, on principle it seems to me clear that that could not be right. The question is: Is the disability due to the accident? If it is attributable to unreasonable conduct on the part of the workman in refusing to undergo treatment which would probably cure him, then it seems to me it matters not whether the suggestion of such treatment originates from the employer or from the man's own medical attendant. It seems to me quite unwarranted to suggest that, on the one hand, if the man's own surgeon advises an operation, and the man refuses to have it, that is not a refusal in any relevant sense, and, on the other hand, that, if the surgeon were employed by the employer, the refusal would be a real refusal for this purpose. It seems to me that it is a question in each case of whether the disability is due to the accident or to this conduct on the part of the workman. In the present case, the county court judge has found, as a fact, that there was a refusal, and that it was unreasonable. Once it is established that there was no necessity for an antecedent request by the employer, the only answer left to the appellant on this head is to say that, even on that basis, there was no evidence upon which the county court judge could find either that there was a refusal, or that the refusal, if any, was unreasonable. I do not think it necessary to refer to the evidence, but, in my judgment, there was ample evidence upon which he could find both that there was a refusal and that it was unreasonable. The result of that conclusion is that, so far as any present award of compensation is concerned, the award was right, and cannot be upset.

Then it is said that a declaration of liability ought to have been made. It was pointed out that, if the workman were now to have the operation which is advised, and were not to be cured by it (and the evidence does not suggest that cures always take place), he would still be suffering the disability, which could not, in that state of circumstances, be attributed to any refusal, but would be referable only to the original accident; that, in those circumstances, it would not be right that he should be deprived of any right of compensation; and that the effect of the present award would be, if that happened in the future, that he could not be entitled to compensation. That proposition appears to be unassailable. The only question is whether the evidence was sufficient to justify a declaration if the judge had made it. It seems to me that, if the judge had made a declaration, there was ample evidence to justify the making of it, in view of the reasonable possibility, indeed the reasonable chance, that an operation, if undergone, would not prove successful. On that basis, if a declaration had been made, this court would have been unable to interfere with it on the ground of there being no evidence, and, in so far as the evidence may be said to be defective in any respect, that circumstance was due to the fact that, on their pleading, the employers were not going to oppose the making of that declaration. That being so, it is hardly right to criticise the evidence which would be necessary before such a declaration could be made. The county court judge's judgment was delivered about one month after the hearing, and delivered without any notice to the workman or employers that the judgment was going to be delivered, with the result that nobody was in court at the time. In the judgment, the judge makes no reference whatever to the question of a declaration of liability, and there was nothing in the language he used to suggest that he had applied his mind to the question. It was an oversight in the preparation of his judgment, and, if the parties had been present, that matter would have been brought before his mind, and I cannot help thinking that he would have made a declaration of liability, in view of the submission to that form of relief which the employers had made. I have no doubt that the omission to notify the parties was due to some unfortunate oversight. If the parties had been there, no doubt an application would have been made to the judge to deal with the question of the declaration, and it would have been impossible for the employers to have refused. I have no doubt a declaration would have been made, as it ought to have been made, on the evidence.

The result is that this court has jurisdiction to make such a declaration, notwithstanding that the judge did not direct his mind to the subject. A declaration will be made, and the award varied in that way.

Romer, L.J.: I agree.

MacKinnon, L.J.: I agree.

Solicitors: *Pattinson & Brewer*, agents for *Pearlman & Rosen*, Hull (for the appellant); *Boxall & Boxall*, agents for *Drury & Taylor*, Goole (for the respondents).

[*Reported by* Reginald Townsend, Esq., *Barrister-at-Law.*]

BEAUCHAMP *v.* FROME RURAL DISTRICT COUNCIL.

[Chancery Division (Farwell, J.), **October 27, 28, 29, November 1, 1937.**]

Water Supply—Local authority—Exercise of statutory powers—Interference with private rights—Whether injunction available or only a right to compensation—Grant of water rights as now enjoyed—Extent of grant.

The plaintiffs were the owners in fee simple and the tenant of a farm which had been sold to their predecessors in title in 1923. The 1923 conveyance contained the words " . . . together with the right as now enjoyed in common with others having the same right to the water supply to the hereditaments hereinbefore described through pipes from a spring. . . ." In 1933 whatever rights had been conveyed to the then purchasers in 1923 passed to the plaintiffs. In 1934 the defendants, a local authority, acquired the pipes and water rights which constituted the water supply to the farm. As a result of certain alterations made by the defendants, the supply of water to the farm was decreased. The plaintiffs sought an injunction to restrain the defendants from making these alterations. It was contended that this action would not lie, the proper remedy being a claim for compensation under the Public Health Act, 1875, s. 308:—

Held: (i) the action lay. The plaintiffs would only be confined to their remedy by way of compensation if it were shown that the invasion of private rights was necessary for the proper carrying out of the statutory duties. The onus was on the local authority to justify its acts by showing that necessity.

(ii) upon the construction of the deed of 1923 the only right conveyed was one to use such water as might be obtained through the pipe in question. There was no right to prevent the pipes being tapped or the A supply of water being otherwise diminished.

[**EDITORIAL NOTE.** Where works are undertaken for a public purpose, the courts are slow to interfere by way of injunction with public bodies not working for a profit. It is necessary, however, for public authorities to show that any invasion of private rights is really necessary for the carrying out of their statutory B duties before the private owner is relegated to his remedy by compensation only.

AS TO GRANTING INJUNCTIONS AGAINST PUBLIC AUTHORITIES, see HALSBURY, Hailsham Edn., Vol. 6, pp. 28-30, para. 28; and FOR CASES, see DIGEST, Vol. 38, pp. 52-57, Nos. 301-337.]

Cases referred to:

C (1) *Stainton* v. *Woolrych, Stainton* v. *Metropolitan Board of Works & Lewisham District Board of Works* (1857), 23 Beav. 225; 28 Digest 468, *780*; 26 L.J.Ch. 300; 28 L.T.O.S. 333.

(2) *Burrows* v. *Lang,* [1901] 2 Ch. 502; 19 Digest 36, *189*; 70 L.J.Ch. 607; 84 L.T. 623.

(3) *Schwann* v. *Cotton,* [1916] 2 Ch. 459; 19 Digest 52, *291*; 85 L.J.Ch. 689; 115 L.T. 168.

D

ACTION for an injunction to restrain the defendants from interfering with the water supply to the plaintiffs' farm. The facts and arguments are fully set out in the judgment.

Sydney G. Turner, K.C., and *Maurice Berkeley* for the plaintiffs.

E *Sir Herbert Cunliffe, K.C.*, and *Hon. Denys Buckley* for the defendants.

FARWELL, J.: The plaintiffs in this action, other than the plaintiff Tucker, are the owners in fee simple of a farm known as Mells Green Farm, in the county of Somerset. Mr. Tucker, the last plaintiff, is a tenant of F that farm, having entered into his tenancy in Mar., 1934. He is a yearly tenant, and is still in possession as tenant. The plaintiffs complain that the defendants, the Frome Rural District Council, have removed certain stop-taps, and disconnected from the plaintiffs' water supply the defendants' pipes, and that they have interfered with the supply of G water to the farm, and they seek the necessary injunction and relief to prevent that from being done. The defendants, who are the sanitary authority for the district, say, in the first place, that this action will not lie, because it is not a case for an action in these courts, but that the plaintiffs' only remedy, if they have a remedy at all, is by way of a H claim for compensation under the Public Health Act. Secondly, they say that the plaintiffs have no right to water, in the sense of being entitled to any supply of water, and that, therefore, they cannot complain of what has been done, even if what the defendants have done would have damaged them otherwise. They say that the grant made to the predecessors in title of the plaintiffs is in such vague terms that it is not a legal right which this court can enforce. Finally, they say that, on any aspect of this case, there is no evidence to show that anything has been done by the council to damnify the plaintiffs, and that, the onus being on the plaintiffs, they have not discharged that onus.

The facts are as follow. Prior to 1923, the farm in question and the immediately surrounding property were the property of Sir John Horner. He lived in the immediate neighbourhood, at the Manor House, and he had ground and gardens in that immediate neighbourhood. The Manor House is close to the village of Mells, which is not a very large village. There is also a place called Little Green not far from the village, and the farm itself is in close proximity to the village. At some time, Sir John Horner, or his predecessors in title, in order to provide both for his own house and gardens and for the people of the village, and other people in the neighbourhood, did certain works for the purpose of bringing a supply of water to the necessary places. There are two sources of water in the immediate neighbourhood, one to the north-east of the farm and of the Manor House, being certain springs which are known as the Conduit Springs, and there are, to the south-west both of the farm and of the Manor House, other springs which are known as the Chantry Springs. Those were the sources of the water which was brought by pipes to the necessary places. With regard to the conduit supply, there was a 2-inch pipe from the Conduit Springs leading directly down to the Manor House, no doubt primarily for the purpose of supplying the Manor with water. But the pipes extended past the Manor House, down past the Rectory, and continued for a short distance, where the pipe-line came to an end, and presumably the water there simply went to waste. At the other end, the Chantry supply, a 2-inch pipe was put in, and water was carried from that to a 2-inch pipe which ran across the land which was then the property of Sir John Horner. At one point, south of the farm itself, there was a 1½-inch pipe which carried water down to Mells Park Gardens, and that water supply was intended for, and has in fact been used for, the purposes of those gardens. In addition to that, there was a ¾-inch pipe which supplied water to a farm known as Claveys Farm and to the school buildings, and then provided water for a house or cottage in the woods. There was, as it were, a line of pipes, and a 2-inch pipe which was carried on up to a point close to the farm in question. From that pipe another ¾-inch pipe ran up to the farm, and was used for carrying, and was intended to carry, water to the farm. The pipe, which was not quite up to the farm, was carried on as a 1¼-inch pipe up to Little Green, and so up to a farm known as Prospect Farm. There were, on that line of pipes, standpipes, which enabled the villagers and people living in the immediate neighbourhood to obtain from those pipes such water as they required. At that time, there was no direct connection with the cottages in the village, but the persons relied for the water which they used upon the water which they could obtain from standpipes. That line of pipes carried on up to Prospect Farm, where again it came to an end, and there was no connection between the line of pipes from the Conduit Springs and the line of pipes from the Chantry Springs. The water supply which came from the Chantry Springs was at one time considerable, but I think that there is no doubt, from the evidence, that the water which comes from the Chantry Springs has been reduced in volume in recent years. No doubt certain gauges of the water were taken, and no doubt they were taken in a somewhat rough-and-ready way, but at the same time it is impossible, in my judgment, wholly to disregard that evidence, and to disregard the fact that, in the last two or three years, the supply of water coming from the springs has been very considerably reduced.

There is not, and has not been, any trouble about the water, or scarcity of water, which gets to the farmhouse and the farm, except in a dry summer. No suggestion has been made that in the other months, the wet months of the year, there is not water for the farm in sufficient quantities to enable the farmer to carry on his business there. For many years prior to 1935, however, in times of drought there have been complaints about the lack of water at the farm, and it is not difficult to appreciate that when one realises that this 2-inch pipe is tapped, before it gets to the farmhouse, both by the pipe which runs down to Mells Park Gardens, and from which water is taken, no doubt, in large quantities in dry seasons—in regard to which the amount to be taken is in no sense limited at all—and, further, before the water reaches Mells Farm, water is taken from the main pipe by Claveys Farm, and the school and other houses. Further, it has to be remembered that Mells Farm stands higher up than do the main pipe and the village of Little Green and Mells, towards which the ground slopes down, with the result—and this, I think, is quite plain on the evidence—that, if there is not a great deal of water in the 2-inch pipe by the time it gets to the place where there is a junction with the pipe from the farm, it does not get up to the farm at all. I am satisfied, on the evidence that I have heard, that there have been, for many years past, complaints of the scarcity of water at the farm itself during dry summers. No doubt some of that scarcity may have been due to defects in the pipe itself—leakages, or possible airlocks—but that there has been difficulty for want of water in the pipes is clearly established.

Now, in those circumstances, in 1923 Sir John Horner determined to put up for sale by auction certain of his property in the neighbourhood, including Mells Green Farm. Particulars of sale were prepared, and included in that sale was this farm, which was in Lot 2. Then there is this note :

> The water supply to the farm comes through pipes from a spring on Lot 19 [the lot on which the Chantry Springs were] and the right to a continuance of this privilege is sold with this lot, but without any guarantee on the part of the vendor as to the adequacy or continuity of the supply.

Those statements in the particulars must be taken to have been known to the purchasers at that auction. The property was sold to Messrs. Winslade, the vendors being Sir John Horner and his wife and certain mortgagees. The property was conveyed to the purchasers, the parcels being:

> All that farmhouse outbuildings lands hereditaments and premises situate in the parish of Mells in the county of Somerset and known as Mells Green Farm A
> together with the right as now enjoyed in common with others having the like right to the water supply to the hereditaments hereinbefore described through pipes from a spring on a piece of land forming part of Lot 19 at the said sale the purchasers making good all damage caused by the exercise of such right subject always and reserving to the vendor his heirs and assigns an easement and right for a line of water pipes crossing the plots of land numbered [the numbers are set out] on the plan part of the hereditaments intended to be conveyed together with the right at B
> all times to enter upon the said plots of land for the purpose of inspecting cleansing repairing or renewing the said water pipes the vendor his heirs or assigns making good any damage caused to the said lands by reason of such inspection cleansing repairing or renovation.

Those are the important words, and it is under those words that the plaintiff claims that he is entitled to relief in this action. For the C
moment, I am not going to discuss the meaning of those words, but I think that it is useful to say now that, although, *prima facie*, if the land in which the pipes were contained were sold, the pipes would primarily pass as part of the property which was conveyed, it is not suggested in the pleadings here that the pipes are the property of the plaintiffs, nor D
is any complaint made because of the actual touching or joining-up of those pipes, apart from the suggestion that, by their doing so, the water has been tapped, and therefore the plaintiffs damnified. Having regard to the terms of this grant, I think that in all probability the intention of the parties was that the pipes themselves should not pass, but that E
they should remain the property of the vendors, and that the vendors should have the right which is there reserved to enter upon the land for the purpose of examining and repairing or renewing the pipes. Whatever the extent of the grant may be, I think, although it is not really necessary for me to determine it, that the pipes themselves did not pass F
to the purchasers under this conveyance. But, as I have said, there is no claim made in the action by the plaintiffs with regard to the pipes themselves, and therefore I need not consider that matter any further. In 1933, the purchasers under that conveyance sold the property in question to the first four plaintiffs, and that conveyance, which is dated G
Sept. 27, 1933, conveyed the farm and the buildings, etc., to them, and also gave them the same right as that which they had acquired under their conveyance with regard to the water. I think the language is the same in all respects, and it is not suggested, and could not be suggested, that the plaintiffs in this case obtained anything more than, or indeed H
anything less than, that which the vendors themselves had obtained, by virtue of the conveyance to them in 1923.

The plaintiff Tucker went into possession of the farm, as the yearly tenant of the other plaintiffs, on Mar. 1, 1934. On May 17, 1934, Lady Horner—by that time Sir John Horner was dead—sold to the defendants, the rural district council, the water-rights and the pipes, etc., with which I am concerned in this case. The agreement, which is dated May 17, 1934, was made between Lady Horner of the one part and the rural district council of Frome of the other part, and it recites:

> Whereas: 1. Lady Horner is the owner in fee simple of certain springs of water near the village of Mells aforesaid within the district of the council and also of a system for the supply by gravitation of water from the said springs by means of reservoirs, water-mains and branch-pipes to certain houses and premises and standpipes in the said village short particulars of the sites of the said springs and of the said system of supply stating the houses and property so supplied with water are set out in the first schedule hereto. 2. The council being desirous of taking over and acquiring the said springs and water-supply for the village of Mells aforesaid have requested Lady Horner to transfer convey and assign to the council the supply and works which Lady Horner is willing to do upon the terms and subject to the conditions herein contained.

Then Lady Horner's agreement is that the springs of water and the reservoirs, water-mains, branch-pipes and standpipes forming and constituting the water supply are assigned to the council, with

> . . . full right and liberty for the council and their officials servants and workmen at any time to enter upon the lands belonging to Lady Horner for the purposes of relaying repairing maintaining or extending the said water-supply and the springs reservoirs water-mains branch-pipes and standpipes in connection therewith the council making good all damage occasioned thereby and satisfying any claims for damage put forward by the tenants of the lands. No alterations or extensions shall be undertaken without the consent of the said Lady Horner or her representative. Should any curtailment of the overflow from the reservoir in Ordnance Survey No. 141 be brought about alternative facilities for watering stock shall be afforded.

Then, on the council's part, the agreement was

> . . . to afford a free adequate and uninterrupted supply of water to the properties set out in the second schedule hereto but not to alter the existing method of supply without the consent of Lady Horner or her representative.

Then the consideration is stated, and in para. 5 it provides that:

> The supply of water to the Manor House Mells aforesaid shall always be regarded and treated by the council as entitled to the first call on the said water supply and for this purpose the present system of supply shall always be maintained unless and until any alteration thereto is agreed to by Lady Horner. Should the existing supplies to Branch Farm and the Down Farm fail hereafter the right for Lady Horner to connect to the conduit supply shall be reserved and a free supply afforded.

Then there are certain general provisions, to which I need not refer, and the first schedule is:

> The Conduit supply emanating from springs in Ordnance Survey Nos. 33 and 141 and thence piped direct to Manor House and so on to the Rectory and other sections on the north side of the village. The Chantry supply emanating from a spring in Ordnance Survey No. 34 and piped thence to Claveys Farm in the first instance and so on to Little Green with sundry intermediate branches.

Then there are two other schedules, one of which contains the Manor House and other houses, and the other of which contains a schedule of properties owned by Lady Horner. It will be noticed that no mention at all of the Mells Green Farm is made in that document, nor is there any express reservation of any rights at all with regard to Mells Green Farm.

There was, at a later date, a supplemental agreement dated Feb. 20, 1935, which recites that:

> doubts have arisen whether owing to some abnormal draw-off in the lower parts of the supply-system mentioned in the principal agreement the pressure of water at the Manor House Mells aforesaid mentioned in the principal agreement might not be sufficient to fill the storage tank at the said Manor House.

A

Then it is provided that there is now in existence a stop-valve. That, I think, is not very important, but it has to be mentioned, as one of the documents relevant to this case.

Now the rural district council acquired those water-rights with a view to carrying out their obligation, as the sanitary authority, to provide B water for the use of the persons living in Little Green and Mells and the immediately surrounding country. They, as the sanitary authority, had power to do certain works, which would include the making of a supply of water for the inhabitants, and it was in pursuance of the intention to carry out this duty that they acquired these rights from Lady C Horner, and proceeded to do the works which I shall now mention, and which are said to damnify the plaintiffs. The works in question were carried out under the direction of a firm of engineers, Messrs. Parker, Pearson & Ross Hooper, who carry on business at Chippenham and in London. They designed the works, and recommended them to be done, D and the works were carried out under their supervision. It has not been suggested in this case that the work was not properly done, so far as the work itself is concerned, although the result of the work is complained of. What the council did was this, putting it very shortly: they joined up the two water supplies, the Conduit supply and the Chantry supply, E by putting in a new 2-inch pipe, running from the end of the old 2-inch pipe from the Conduit Springs down to a point where it was joined to the existing 2-inch pipe from the Chantry Springs. The point of juncture was beneath the high road, immediately in the neighbourhood of Mells Farm, and at the point where the pipe leading up to Mells Farm F itself joined the old original 2-inch pipe. The 2-inch pipe which was put in there runs from that point in a north-easterly direction for a short distance, and then there is a small reservoir or tank, holding some thousand gallons. From that point, the pipe runs on, and is carried up past Little Green, and so on, until it joins the other pipe at the other G end. That pipe serves to provide water for the persons in Little Green and elsewhere, and undoubtedly the water-supply direct to this house, or some of it, has been made by means of that pipe. The reservoir, or so-called reservoir, is fitted with a stop-valve, a ball-balve, which operates in the ordinary way, cutting off the supply when the water-tank is full. H There are also means for regulating the flow of water along that pipe. and at present, and I think since that pipe has been in existence, the amount has been limited to two gallons a minute. So far, that has been the whole of the water which has been taken, but no doubt it is possible for the council, by opening the valves, to obtain a supply of water larger

than that, if they need it. That work was done in the Spring of 1935, and it happened that that was a somewhat dry summer, and that Mells Farm found itself very short of water. Mr. Tucker had in 1934 not been troubled with anything of that sort. He had had all the water that he wanted, and, when he found that in 1935 the supply was very unsatisfac-
A tory, that on some days there was no water at all, and that on other days the amount of water was quite small, he not unnaturally assumed that the trouble arose as a result of the work done by the defendant council. After certain complaints had been made, both on behalf of himself and on behalf of the other plaintiffs, and after efforts had been made to
B come to some amicable arrangement, which most unfortunately failed, the plaintiffs commenced this action. It has to be borne in mind that it is for the plaintiffs to prove that what the defendants have done has in fact resulted in some deprivation of some right which was in the plaintiffs, and, unless they can discharge the onus of showing that, this
C action cannot succeed.

This action was commenced on Nov. 12, 1935, but, before I come to deal with the rights of the parties, I should say that the evidence of Mr. and Mrs. Tucker, who gave their evidence very well indeed, quite frankly is that, although there was some difficulty and trouble with the
D water in 1936, and again this year, it was not anything like so serious as in 1935. That there was a shortage of water, however, in both those summers is, I think, quite plain. I should also add that the defendant council had done certain works on the pipe leading from the Chantry Springs up towards the farm in the way of removing and preventing
E airlocks, and doing certain repairs to the pipes themselves where there was leakage, and these works no doubt have tended to improve the supply of water, but that the supply of water from the spring itself is insufficient as compared with what it was in other days is, I think, as I have already said, quite proved.

F Having regard to those circumstances, the plaintiffs commenced this action, and the first defence which the defendants have set up is this. They say that under the Public Health Act the defendants have done that which they were authorised to do, and there is no remedy for the plaintiffs in this court, that the remedy must be by way of a claim for
G compensation under the Act itself. In order to consider that matter, I must refer quite shortly to the Act. The Public Health Act, 1875, s. 51, provides:

> Any urban authority may provide their district or any part thereof, and any rural authority may provide their district or any contributory place therein, or any
> H part of any such contributory place, with a supply of water proper and sufficient for public and private purposes, and for those purposes or any of them may—(1.) construct and maintain waterworks, dig wells, and do any other necessary acts.

There are certain other rights, which I need not read. It is not suggested, nor could it be suggested, that this particular place was not within the rural district council's jurisdiction, or that they were not entitled to take steps for the purpose of providing the water supply for this neighbourhood. Sect. 54 provides :

> Where a local authority supply water within their district, they shall have the same powers and be subject to the same restrictions for carrying water mains within or without their district as they have and are subject to for carrying sewers within or without their district respectively by the law for the time being in force.

A

In order to see what those powers are, it is necessary to turn to sect. 16, which provides that :

> Any local authority may carry any sewer through across or under any turnpike road, or any street or place laid out as or intended for a street, or under any cellar or vault which may be under the pavement or carriageway of any street, and, after giving reasonable notice in writing to the owner or occupier (if on the report of the surveyor it appears necessary), into through or under any lands whatsoever within their district. B

It is not suggested here that any such notice was given. Then, finally, the only other section to which I think I need refer is sect. 308, which provides for compensation in the event of anyone being damnified, and is as follows : C

> Where any person sustains any damage by reason of the exercise of any of the powers of this Act, in relation to any matter as to which he is not himself in default, full compensation shall be made to such person by the local authority exercising such powers ; and any dispute as to the fact of damage or amount of compensation shall be settled by arbitration in manner provided by this Act, or if the compensation claimed does not exceed the sum of £20, the same may at the option of either party be ascertained by and recovered before a court of summary jurisdiction. D

It is said that, having regard to those sections, the plaintiffs' remedy is to seek compensation, and is not by way of an action. I think that, apart from authority, one would be inclined to take that view, but I think that the authorities do establish quite plainly that *prima facie* E it is not part of the duty thrown upon, or powers given, to the local authority to invade the rights of private persons, and, although there may be cases where the councils, in doing so, can show that such invasion was necessary, for the purpose of enabling them to carry out their duties, in my judgment, the authorities establish that, unless that is shown, F then the invasion of the rights of private people is something of which a private person can complain, and for which he can obtain relief, if necessary, in these courts. In my judgment, it is for the rural district council in a case of this kind, where the plaintiff is complaining that his rights have been invaded, to show that such invasion was necessary G for the proper carrying out of their duties, and, unless they can show that, then the person so damnified is entitled to maintain an action in these courts. It is not, in my judgment, for the plaintiff, if he alleges that his rights have been invaded, to proceed to allege and to prove that the work was unnecessary, or anything of that kind. Having made that H allegation that there has been an invasion of his private rights, it is then for the defendant council, if it can, to justify its act, by showing that it was necessary for the proper carrying out of its duties. I have had no evidence of that sort in this case, and, in my judgment, this action is one with which this court can properly deal. If the rights of the plaintiffs

have been invaded, then they are entitled, in my judgment, to obtain
relief in this court, and they are not relegated to a claim for compensation.

I was referred to one authority in support of the proposition that the
remedy was by way of compensation, and not by action. That was a
decision of SIR JOHN ROMILLY, M.R., in the case of *Stainton* v. *Woolrych*
A (1). That case seems to me not to apply here, because in that case what
the local authority had done was something which by the Act itself they
were expressly authorised to do, and an express authority to do such an
act affords any person damnified no remedy except by compensation.
But it is impossible to say that a power to do things in general is an
B express authority to invade the rights of individuals, and, in my judgment,
that decision has no application here, and, following what I think
is a long line of authority in support of it, this seems to be such an action
as the plaintiff would be entitled to bring. Therefore, so far as that
defence is concerned, I do not think it is an answer to this case.

C That leads me to the next question which I have to determine, namely,
what is the extent of the grant which the plaintiffs' predecessors obtained
in the conveyance of 1923 ? It was argued, on behalf of the defendants,
that this is an easement, and that, it being an easement, it was precarious,
inasmuch as it was at the mercy of the grantor, and that it was so uncertain
D and precarious as to be such a right as this court would not
recognise. In support of that proposition, reliance was placed upon the
decision by FARWELL, J., in *Burrows* v. *Lang* (2). Far be it from me to
suggest that that case was not rightly decided, but, in my judgment, that
authority has no application here. I think it is plain that, where one is
E construing an express grant, then the question of whether or not the
easement would be precarious does not arise at all. I think that, if
authority is wanted for that, it is to be found in the Court of Appeal in
Schwann v. *Cotton* (3). Where it is a question of an express grant, the
question as to whether the grant is one which may be precarious, or anything
F of that sort, has not to be considered at all, and, in my judgment,
the decision in *Burrows* v. *Lang* (2) clearly turns upon the fact that, in
that case, the easement which it was sought to establish was not the
subject-matter of an express grant, but was an easement in which a
grant had to be implied. In such a case as that, of course, that rule is
G clearly applicable, but it has no application to the present case. On the
other hand, of course, as a matter of construction of the express grant,
it may be expressed in such vague and unsatisfactory language that the
court is unable to give effect to it at all, because it is unable to ascertain
what the extent of the right may be. But, apart from that, if there is
H an express grant, the grant is *prima facie* a good one, and it is only a
matter of construction to ascertain what the extent of that grant may be.

With those words, I turn to the grant in this case. I am entitled, in
considering what the true construction of this document is, to have
regard to the surrounding circumstances. I am entitled to consider,
first, that the owner of the surrounding property was the vendor, who

had put in these pipes partly for the purpose of supplying his neighbours with water but also for the purpose of supplying himself and his gardens with water, and that the 2-inch pipe leading from the Chantry supply was first tapped by the pipe leading down to the Mells Park Gardens, and that there is no evidence to suggest that there was any kind of limit placed upon the amount of water which might be taken for the use of A Mells Park Gardens. I am also entitled to consider that there is nothing to suggest that Claveys Farm or the school premises or other premises were not entitled to take all they could get, even if, by so doing, they reduced the remaining water in the pipe to such an extent that no water would reach the farm at all. Further, I am entitled, in my judgment, B to take into account that the purchasers at the auction were expressly told that, although the right to water was sold, it did not include any guarantee on the part of the vendor as to the adequacy or continuity of the supply. Having those considerations in mind, I turn to see what this grant means. That it is a grant of water is, of course, apparent, C and it is a grant, no doubt, which entitles the grantee to take any water which comes through these pipes to his farm for his own purposes and free of charge. That, I think, is not unimportant, because *prima facie* a person supplying water to somebody else's property might well be entitled to claim payment for those services, and there is no doubt that D this grant does entitle the owners of the farm, or the occupiers of the farm, to take water which comes up the pipe on to the farm, and to take as much as they want, if they can get it, without charge at all. The question really is: Is this a right which entitles the grantee to have any water at all, or is it only a grant which entitles him to have such water E as comes up the pipe, without making any payment for it? In my judgment, on the true construction of this grant, it is not a grant of water in the sense of being a grant which entitles the grantee to require that the grantor shall see that there is water for his benefit. It is merely a right to such water as passes up the pipe on to the farm, and that F water he is entitled to without payment. He could not, in my view, complain if the owners for the time being of Mells Park Gardens tapped the water, and took so much of the water out of the pipe, before it got to the farm, that there was not sufficient pressure to drive any water on to the farm at all, nor could he object if they did that over a long period G of time. Similarly with Claveys Farm and the school. There is nothing, in my opinion, which would entitle the plaintiff to say: "The water is not coming to my farm because you are taking such large quantities that there is not sufficient left to get the water up to me." If that be the true view, can it be said that there is a right to prevent the pipe from H being tapped in a new place, even though the result of that may be further to diminish the supply of water? I gather that it is suggested that the right is a right to such water as passes along the 2-inch pipe and finds its way to the farm, in the circumstances as they existed in 1923, and that the plaintiff would be entitled to object to any further tapping of the pipe because his right is, it is said, to any water—not a right to insist upon water, but a right to any water—which, in the circumstances which existed in 1923, would have got to the farm, and, if that supply is reduced—for example, by tapping the pipe at some point before it gets to the farm—then he has a ground for action. I do not so read this grant. In my judgment, it is nothing more than a grant of a right to the water if and when the water gets to the farm, the vendor reserving to himself, as it appears to me, complete freedom to deal with the water and the water supply in such a way as he pleases. He was clearly, in my judgment, under no sort of obligation to repair the pipe, or to prevent leakage at the source, and, if he chose, he could, in my opinion, have allowed the water to run to waste at the springs because the pipe fell into disrepair, or for some other reason, and no action would lie against him by the owner of the farm. If that be so, it is difficult to suppose, in my judgment, that either of the parties to the conveyance of 1923—Sir John Horner and his successors in title—should be under any obligation at all with regard to this water, except an obligation to permit the owners of the farm to take such water as they could get through these pipes, without making any charge for the same. In my judgment, if that be the true construction of this grant, and if it is such a limited grant as that, then, of course, it must follow that this action cannot succeed, because the defendants have not done anything which gives a cause of action to the plaintiffs. The plaintiffs can be in no better position than were their predecessors in title, and, if their predecessors in title got nothing more than that very limited grant, then they cannot complain of what has been done.

In these circumstances, it must follow that, in my judgment, on that ground, this action must necessarily fail, but, as the matter is one of some importance, and it may well go further, it would be, I think, desirable that I should say, in a few words, what I think is the true effect of the evidence which has been given, assuming that I am wrong in the construction which I have put upon the grant. I think that undoubtedly the scarcity of water, of which complaint has been made, is by no means due only to anything that the defendants have done. There was a scarcity before they did anything, and there will inevitably be a scarcity from time to time, notwithstanding what they have done. I think that it is quite plain that it is impossible to impute to the defendants or their works anything like the whole of the scarcity which was complained of in 1935, and which has to some extent been complained of since. But, on the other hand, in my view, it is impossible to suppose that, under certain conditions and in certain somewhat limited circumstances, the presence of this pipe, the new pipe tapping the old one, does not quite clearly have an effect upon the plaintiffs' position, if the water in the old 2-inch pipe is reduced, either because the supply from the source is limited or because so much water has been taken before it gets to the farm. But, if the supply is low when the water gets to the farm, or would have been low when it got to the farm, before the defendants' works were done, then, in such a case as that, there may well be cases where there would be sufficient water to enable some water to reach the farm, whereas the abstraction by the defendants of even the limited supply which they now take might well be sufficient to prevent the water from getting to the farm at all. In my judgment, although it is not true to say that the scarcity of water is wholly due to anything the defendants have done, I cannot say, on the evidence that I have heard, that the acts of the defendants may not have caused some damage to the plaintiffs, to a limited extent and on limited occasions, preventing them from getting water which they might otherwise have got. Further, it cannot be overlooked that, if the defendants were to take a much larger quantity than they are taking now through their new pipe, that would almost certainly have a serious effect on the water getting to the farm ; but, as it is not necessary—I am not deciding the case on that ground—I need not say any more about it. It is sufficient for me to say that the plaintiff has not satisfied me that he has obtained any such right to water under the conveyance of 1923 as entitles him to maintain this action. Accordingly, the action will be dismissed with costs.

Action dismissed with costs.

Solicitors : *Robbins, Olivey & Lake*, agents for *Nalder, Littler & Addleshaw*, Shepton Mallet (for the plaintiff) ; *Taylor, Willcocks & Co.*, agents for *E. G. Ames & Son*, Frome (for the defendants).

[*Reported by* J. MACGILLIVRAY ASHER, ESQ., *Barrister-at-Law.*]

R. *v.* LEWIS.

[COURT OF CRIMINAL APPEAL (Lord Hewart, L.C.J., Humphreys and du Parcq, JJ.), **November 9, 1937.**]

Criminal Law—Accomplice—Corroboration—Absence of direction to jury—Power of Court of Criminal Appeal to confirm conviction—No miscarriage of justice—Criminal Appeal Act, 1907 (*c.* 23), *s.* 4 (1).

The prisoner was charged with receiving property, well knowing the same to have been stolen. The defence was that the prisoner had been the innocent victim of the actual thieves, who had "planted" the property on him. The thieves themselves gave evidence against him and the prisoner gave evidence which was very similar to the story of the prosecution, except that it denied any knowledge on the part of the prisoner that the property had been stolen. The jury received no direction upon the necessity for corroboration of the evidence of accomplices :—

HELD : the case was one where such a direction was undoubtedly necessary, and, though the court had power to allow the verdict to stand, this was not a case where there was corroboration of such manifest cogency that the conclusion was not to be resisted that the jury, properly directed, would certainly have arrived at the same conclusion.

[**EDITORIAL NOTE.** In the ordinary way, it is essential that the evidence of accomplices should be corroborated, and the judge should give a direction to the jury upon this point. Where, however, the judge has, by inadvertence, omitted to give to the jury a proper warning, the Court of Criminal Appeal may, provided that there is corroboration, dismiss the appeal, and allow the conviction to stand, upon the ground that there has been no miscarriage of justice. If it is to take this course, it must be satisfied that there does exist in the case corroboration of such manifest cogency that the conclusion is not to be resisted that, had the jury A been properly directed, they would still have convicted the prisoner.

As to Direction to Jury on Corroboration, see HALSBURY, Hailsham Edn., Vol. 9, pp. 222-224, paras. 309-313; and for Cases, see DIGEST, Vol. 14, pp. 466, 467, Nos. 4960-4972.]

Cases referred to:

B (1) *R.* v. *Baskerville*, [1916] 2 K.B. 658; 14 Digest 463, *4934*; 86 L.J.K.B. 28; 115 L.T. 453.

(2) *R.* v. *Davies* (1930), 22 Cr. App. Rep. 33; Digest Supp.

Appeal from a conviction at the London Sessions upon the grounds that the chairman omitted to direct the jury as to the danger of con- C victing upon the uncorroborated evidence of accomplices and that there was no evidence corroborating that of the accomplices.

Marquess of Reading, K.C., and *P. Moses* for the appellant.

E. H. Butcher for the Crown.

D Lord Hewart, L.C.J. (delivering the judgment of the court): This appellant, Thomas Lewis, was convicted at the London Sessions of receiving stolen goods, and he was sentenced to 12 months' hard labour. He is now appealing against conviction, and applies for leave to appeal against sentence. The grounds of his appeal are, first, that the chair- E man inadvertently omitted to warn the jury of the danger of convicting on the evidence of accomplices, and, secondly, that there was no evidence corroborating the alleged accomplices.

Now, one thing is perfectly clear, and is common ground, and that is that there was in this case no warning at all with regard to the evidence F of accomplices. The rule is familiar. The practice of common law is for the judge to warn the jury of the danger of convicting on the uncorroborated evidence of accomplices, and it is in the discretion of the judge to advise the jury not to convict on such evidence, though at the same time he may point out to the jury that it is within their legal G province to convict upon it if they choose. So far as the nature of corroboration is concerned, there has been, and there can be, since the case of *Baskerville* (1), no room for doubt that any evidence of an accomplice which tends to implicate the accused must be corroborated in a material particular, or in material particulars.

H Here, in the first count of the indictment, a man named Sansun was charged, as a servant of Messrs. G. T. Cox & Sons, with stealing some of their groceries, and, in the second count, Avery, Wassell and the appellant were charged with stealing those groceries. In the third count, the appellant was charged with receiving those groceries well knowing them to have been stolen. Then counts 4, 5 and 6 charged Sansun, Avery and Wassell with stealing and receiving other groceries. Sansun, Wassell and Avery confessed to their thefts, and were bound over before the appellant's trial. Sansun and Wassell gave evidence for the Crown in the prosecution of the appellant. Sansun at the material time was an assistant in the employ of Messrs. Cox & Sons, grocers, of Bermondsey, and the other two, Avery and Wassell, were vanmen. The appellant A had kept a grocer's shop for about a quarter of a century without complaint, and, according to the evidence, about the middle of August, Sansun, who lived in Kennington, was walking past the appellant's shop at Kennington, when the appellant spoke, and a conversation arose. The appellant asked him if he could get anything round on the cheap, B and then, according to Sansun, he replied that, if he did, it would not be on the straight. The appellant replied that he would take in anything that was sent round. Accordingly Sansun sent Avery and Wassell round in a van with some cheese and some butter. Wassell, according to the evidence, tapped at the door, told the appellant the goods were C from "Jack," who is Sansun, and, having been told to put the goods down, drove off without more ado.

In the case for the prosecution, there was no date for that transaction, but on Saturday, Sept. 4, two police officers went to the appellant's shop and told him that they had reason to believe that he had some D stolen property. The appellant said: "Oh, no, come and have a look round." He was afterwards asked if he had bought any goods from Messrs. Cox & Sons, or if he had any goods which came from them, or knew any employee of the firm named Sansun, and the answer was: "No." He was then told that Sansun and Avery were in custody, and, E asked if he knew any of Messrs. Cox's vanmen, again the answer was "No." The police then found a box bearing Messrs. Cox's label and containing 36 packets of New Zealand butter, proved to be the property of Messrs. Cox & Sons. As to that, the appellant said that the butter had come with 9 other packets in a motor the night before, and was brought F by a very young man whom he did not know. He said that he did not know who had sent them, and that he had not paid for them. The appellant was then asked about three cheeses which were on the floor, and he said that he bought his cheese from a firm named Lovell & Christmas. He produced some bills, but they did not mention cheeses, G however. In fact, two of the cheeses had come from Messrs. Cox & Sons. When the appellant was charged, he made no formal reply, but afterwards he said, according to the police officer: "I am waiting for Sansun to take the cheeses back, they are soapy." After the police court proceedings had begun, the appellant added that two of the cheeses H with tapes round were not his, and pointed to Wassell, saying: "He brought them round."

The defence which was raised was that Sansun, or "Jack," had gone to look for a buyer of stolen goods, had picked out the appellant after some innocent conversation with him about the state of trade, and had then "planted" the property on the innocent appellant. The appellant himself gave evidence, and the part to which our attention was directed was that he said that Jack was unknown to him, and had come up to him outside his shop and discussed trade with him. The appellant said that things were bad, and Sansun told him that his name was "Jack" A and that he might send the appellant something some time. Their conversation ended, because the appellant had to serve a customer. The next thing he heard of this stranger was on the morning of Sept. 4, when Wassell knocked on the door and brought in two cheeses, saying that they were from "Jack." On the following day, when he was serving a B customer, he heard a knock, opened the back door, served his customer, and returned to the back door in time to see Wassell walking out and the box of butter on the floor. On that occasion, Wassell said nothing at all, and the appellant said that he had no idea that Jack was going to send him stolen property, and had never, in his 26 years' experience C of the trade, had such a transaction before.

After a summing up which was effective save for the omission of all reference to the danger of convicting on the evidence of an accomplice, the jury convicted the appellant, after deliberating for only ten minutes. The question for us, in the circumstances, is whether that conviction D ought to stand. No doubt in the course of the past two years there have been many cases where convictions have been quashed because of the omission on the part of the presiding judge to direct the jury appropriately on the danger of convicting on the evidence of accomplices. This court has said that if a direction has not been given it is not E necessarily fatal to the conviction. The question now is whether the proviso to the Criminal Appeal Act, 1907, s. 4 (1), should be applied to this case as being one where there has been no miscarriage of justice. This proviso has not been applied frequently, but it has been applied more than once. Can it be said in this case that, although a proper F direction as to corroboration has been omitted, nevertheless corroborative evidence exists, and it is of such a convincing, cogent and irresistible character that it is apparent that, even after a proper direction, the jury would inevitably have come to the same conclusion ? If so, then the omission is not fatal ; otherwise, it is. For example, we are G referred to the case of *R.* v. *Davies* (2), at p. 35, where, in delivering the judgment of the court, I used these words :

> The omission of an express direction on the position of accomplices is, undoubtedly, a matter for regret. One can only suppose that the judge omitted it because he felt that, in view of the whole course of the trial, such a direction would be H superfluous. The fact remains that the direction does not appear and the question for us is whether, in these circumstances, the verdict of guilty on the fifth count amounts to a substantial miscarriage of justice—or, in other words, whether it is clear that the jury would inevitably have arrived at the same conclusion upon that count, if an express direction on the lines laid down in *Baskerville* (1) had been given. . . . The court is satisfied that, however explicit the direction on those lines had been, the jury could not have arrived at any conclusion other than that to which they came. There is no reason, therefore, for interfering with this conviction.

To apply that canon to the present case, is it possible to say that, if a proper direction had been given, the jury would inevitably have come to the same conclusion ? In our opinion, it is not possible to say so. That there was corroborative evidence here is manifest, corroboration proceeding from the appellant himself. One might even go further, and say that there was strong corroborative evidence, which the jury might A well have thought corroborated the evidence of Sansun and Wassell, but that is not the question here. The question for this court is : Does there exist in this case corroboration of such manifest cogency that the conclusion is not to be resisted that the jury, properly directed, would certainly have arrived at the same conclusion ? Evidence B there was, strong evidence there was, but, in the opinion of this court, the evidence was not so strong as to entitle us to say that the jury must inevitably have convicted if the chairman had not inadvertently omitted to give a proper direction. In such circumstances, we are bound to allow this appeal, and to quash this conviction. C

Appeal allowed and conviction quashed.

Solicitors : *Webster Butcher & Sons* (for the appellant) ; *J. Albert Davis & Co.* (for the respondent).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

D

VERNAZZA *v.* BARBURRIZA & CO., LTD.

[COURT OF APPEAL (Greer, Slesser and Scott, L.JJ.), **November 15, 1937.**]

E

Practice—Application for transcript of shorthand notes—Notes of discussion in judge's private room.

During the trial of an action for breach of contract and wrongful dismissal, the plaintiff had a discussion with the judge in his private room, of which discussion a shorthand note was taken, by the judge's orders. No representative of the defendants was present at the discussion. F The action was then settled. Subsequently, the plaintiff entered notice of appeal, upon the grounds, *inter alia*, that, at the time, he was almost unconscious, owing to shock, and was under a misapprehension as to his legal rights. The respondents applied to the Court of Appeal for an order that a transcript of the shorthand notes of the discussion should be made :—

HELD : (i) this application was contrary to the established practice G with regard to proceedings in chambers, and was not one that could be allowed.

(ii) (*per* SLESSER, L.J.) : the application sought to obtain an order against a third party who was not before the court, and, for that reason also, it could not be allowed.

[EDITORIAL NOTE. Proceedings in chambers have, by long-established practice, H been regarded as private, and this practice extends to the communication of a transcript of shorthand notes of such proceedings. No publication, however restricted, can be made without the consent of the judge.

AS TO THE PRIVACY OF PROCEEDINGS IN CHAMBERS, see HALSBURY, Hailsham Edn., Vol. 26, p. 42, para. 64 ; and FOR CASE, see DIGEST, Practice, p. 704, No. 2992. See also YEARLY SUPREME COURT PRACTICE, 1938, pp. 1506-1508.]

APPLICATION for a transcript of shorthand notes. During the hearing of an action for breach of contract and wrongful dismissal before SWIFT, J., on June 6, 1937, a discussion took place in the judge's private room, as a result of which the action was settled. No representative of the defendants was present at this discussion, but, by the judge's orders, a shorthand note was taken. Subsequently, the plaintiff entered notice of appeal, the grounds of appeal being, *inter alia*, that, at the time of the settlement, he was almost unconscious, owing to shock, and was under a misapprehension as to his legal rights, and that the settlement was against his wishes and intent. On July 28, 1937, the defendants applied to SWIFT, J., for permission to have made a transcript of what had taken place in his private room. SWIFT, J., stated that, as then advised, he would not grant the application, but that, if necessary, he would reconsider the matter in October. The present application was, therefore, made to the Court of Appeal, on account of the death of SWIFT, J.

R. T. Monier-Williams for the applicants.

GREER, L.J.: This application is entirely misconceived, and is contrary to the established practice with regard to proceedings in chambers. No shorthand-writer is ever allowed to be present in chambers without the consent of the judge, nor can a transcript of the shorthand note which was taken in chambers be used without the consent of the judge. In this case, the judge said, according to a letter that has been supplied to us, that

> he saw no reason why the practice that proceedings in chambers are private should be varied and therefore the shorthand notes should not be published.

We see no reason why we should depart from that practice, and the application will be dismissed.

SLESSER, L.J.: I agree, and I would add a further difficulty in the matter before us. The application seeks to obtain an order on a third party, who is not before the court, and who probably could not properly be brought before the court in these proceedings. If the third party were to disobey any order which we might make, the consequences might be very serious for him, and that when he had not been heard and was not interested in the litigation.

SCOTT, L.J.: I agree.

Application dismissed with costs.

Solicitors: *Clapham, Fraser & Williams* (for the applicants).

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

SITWELL *v.* SUN ENGRAVING CO., LTD.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Romer and MacKinnon, L.JJ.), **November 15, 1937.**]

Discovery—Production of documents—Incriminating matter—Matter relevant to issues raised by defence—Part of poem—Alleged scandalous matter disentitling author to copyright. A

The plaintiff sued a printing and publishing company for infringement of copyright by printing six stanzas of a poem of which he was the author. The defendants in their defence alleged that there were other unpublished stanzas of the poem, which contained something which would disentitle the work to protection as a copyright work. Upon discovery, the plaintiff disclosed that he had in his possession B a complete copy of the poem, but claimed to cover up certain parts, on the ground that they would incriminate him. The court ordered that the defendants should be at liberty to inspect the document referred to, including the part which the plaintiff wished to seal up, and, if the plaintiff failed to produce the document for inspection, or to give notice of appeal, the action should stand dismissed. The plaintiff C appealed :—

HELD : the plaintiff, having only alleged an infringement of the six stanzas, ought not to be put in a position of incriminating himself or of having his action dismissed, and the defendants were not entitled to call upon the plaintiff to incriminate himself in order to establish their case.

D

[**EDITORIAL NOTE.** There is a conflict here between the defendants' right to obtain discovery of all documents relevant to the issues raised in their defence and the plaintiff's privilege that he should not be forced to incriminate himself in the course of discovery. In this contest, the plaintiff's privilege has been held to prevail; but the case appears to turn to some extent upon the fact that the plaintiff was only suing in respect of an infringement of the six published stanzas. E

AS TO INCRIMINATING DOCUMENTS, see HALSBURY, Hailsham Edn., Vol. 10, pp. 394-396, paras. 476-478 ; and FOR CASES, see DIGEST, Vol. 18, pp. 161-164, Nos. 1132-1168.]

APPEAL by the plaintiff from an order of CLAUSON, J., dated Oct. 26, 1937. The facts and arguments are fully stated in the judgment of F SIR WILFRID GREENE, M.R.

J. G. Foster for the appellant.

H. J. Wallington, K.C., and *C. R. D. Richmount* for the respondents.

G

SIR WILFRID GREENE, M.R. : This is an appeal from an order of CLAUSON, J., made upon an interlocutory application, which asked for inspection of a particular document and the right to take copies. The action is an action in which the plaintiff sues a printing company and a publishing company for infringement of copyright. The statement of H claim alleges that the plaintiff is the author of a poem entitled *National Rat Week*, and the owner of the copyright therein, and then it alleges that the defendants have infringed the plaintiff's copyright in the said poem by causing the plaintiff's said poem to be printed and published, without the plaintiff's consent, in certain issues of a periodical called *Cavalcade*, of which the first defendants are the printers and the second defendants are the publishers. On the face of that pleading, when examined in the light of the copy of *Cavalcade*, what the plaintiff is alleging, and the only thing that he is alleging, is authorship of the poem as there appearing, which consists, I think, of six stanzas. That is the poem which he A describes in his statement of claim as *National Rat Week*, and that is the poem which the defendants have copied.

On the face of that statement of claim, the issues involved would be comparatively simple, but the second defendants (on whose application the order now under appeal was made) raised in their defence a question B of law and a question of fact. The question of fact which they raised is one which it would be necessary for them to establish before the proposition of law upon which they rely could assist them, even if it be right, and, for the purposes of this application, I think that we must assume, without expressing any opinion upon it, that the proposition C of law which their defence raises is a correct one. I am not, of course, purporting to read it in the express language used in the defence, but this is the proposition of law which the defence appears to me to involve: that, where a person has written an unpublished work, and that work contains a portion which, for some reason, such as its libellous nature, or D obscenity, or something of that kind, would not be entitled to protection in a court of equity under the law relating to copyright, he is not entitled to complain of infringement of copyright against anybody who has printed or published the inoffensive portion of his work; and that, therefore, once it appears that the whole work (whatever that may mean E in the case of an unpublished work) contains something which would be so disentitled to protection, that vitiates the author's claim to protection in respect of any portion of the work. That is the proposition of law which the defence involves, and, in order to lay the necessary foundation for that proposition, there are certain allegations of fact. F Those allegations may be summarised quite shortly thus. They say that the work which the plaintiff wrote contained, in addition to the six stanzas which they have published, other stanzas, and that, when those other stanzas are added, and read with the six which they have published, the result will be that the entirety becomes disentitled to G protection.

The matter then came to the point of discovery, and the plaintiff swore an affidavit of documents. It must be remembered, in looking at that affidavit, that it was, of course, incumbent upon him to disclose in his affidavit any documents relevant to any issue raised, not merely H issues that he himself raised on the statement of claim, but also the issues which the defendants raised in their defence. The defendants having raised this issue as to the existence of further stanzas, it was incumbent upon the plaintiff, of course, to disclose the existence of any document relevant to that matter, but he claimed in his affidavit, while disclosing the existence of a document on which was written, not only the six published stanzas, but also other stanzas, to be entitled to cover up the other stanzas, upon the ground that they would tend to incriminate him. The actual paragraph in the affidavit of documents is as follows :

> With regard to the documents referred to in the first part of the first schedule hereto and therein described as three drafts of poem *National Rat Week* and complete copy of poem *National Rat Week*, I object to produce and I claim the right to cover up such parts thereof as may to the best of my information, knowledge and belief tend to incriminate me. A

There has been some discussion as to the true construction of that paragraph, particularly as to the true construction of the words "complete copy," and it has been suggested that that phrase constitutes, on B the part of the plaintiff, an admission that the work in respect of which he claims protection in his statement of claim—namely, the six stanzas —is not the whole of the work, and that the work consists of that plus something else, which he claims to cover up. I should have thought, myself, looking at this document, that the words "complete copy" C are inserted in contrast to the word "drafts," that he has three drafts and he has a complete copy, that is to say, a copy which is the final copy which he has made. However that may be, it seems to me quite impossible to treat this paragraph in the affidavit (which, as I say, of necessity discloses the existence of other stanzas in the poem, that being D an issue raised on the pleadings) as in any way modifying or qualifying the claim which the plaintiff is making in the action, which, on the face of his pleading, is a perfectly sound and proper claim, and I cannot read it as an admission by him that the thing for which he is claiming protection is in fact something different, and is in fact what the defendants E say it is. I think it would be wrong to construe that paragraph in any such sense.

If that be the right view, what is the position ? To return to what I said earlier, the plaintiff is alleging that he is entitled to the copyright in the six stanzas which the defendants have published. That, he says, F is the work. The defendants say that, as a matter of fact, that is not the work, that the work consists of something in addition, that, as a consequence in law, the entire work can be looked at, and that if, when looked at, it is found to contain something which would disentitle him to protection in a court of justice, the plaintiff will necessarily fail. G Be it observed, however, that the plaintiff's action does not in any sense involve any allegation with regard to what he has written, except that it consisted of the six stanzas. Therefore, when he comes to the court for protection of what he sets out in his statement of claim, there is no necessity for him to rely on anything additional, so far as his pleading H goes. It is the defendants who have raised this point. It is the defendants who have raised an issue of fact, and they seek at this stage to obtain probative matter by obtaining inspection of a document in the possession of the plaintiff, the object being to enable them at the trial to establish the matter of fact which they have raised. In the ordinary case, of course, they would be entitled to call for production of any document which was relevant to the issue which they had raised, but, although the plaintiff, as I have said, was bound to disclose the existence of any documents which were relevant to the issue raised in the defence, he, on well-understood principles, is entitled to say: "I decline to produce them for inspection, because they would tend to incriminate me." With regard to that, his oath to that effect is a thing which must be taken as conclusive, and the court will not inquire into it. That is the well-understood practice. The result, of course, of that plea, if it be right, is that the defendants are deprived of the opportunity of obtaining, by the method of discovery, that material which would assist them to establish the proposition of fact which they have raised, and they would be deprived of that opportunity by reason of the rule that the plaintiff cannot be made, out of his own mouth, in answer to interrogatories or by production of documents in his possession, to incriminate himself. That would be the misfortune of the defendants, but it is the misfortune of every litigant who seeks to establish his case out of the mouth of a witness, or out of the mouth of the plaintiff by discovery, where the witness, or the plaintiff, as the case may be, is entitled to rely on the rule with regard to incriminating matter.

The judge has dealt with the matter in this way. As I understand it, he accepted the view of the defendants, and held that, when a plaintiff is basing his claim upon an infringement of copyright, he must be prepared to show the whole work, even if there is in it matter which tends to incriminate him. With all respect to the judge, I cannot accept that proposition as being one which is applicable to the present case. I quite agree that, if the work in respect of which infringement is complained of is the whole work in respect of which copyright is being claimed, the plaintiff obviously could not, while claiming copyright in fourteen stanzas, claim to seal up twelve or two, as the case might be. But here the plaintiff is not seeking to do any such thing. He is saying: "This is my work, and this is what you have infringed." Whether his contention, that he is entitled to succeed upon that basis, is right or not, will be a matter which will have to be dealt with if and when this question of law comes to be debated, and if and when the relevant facts are brought before the court. At present we have to deal only with the matter on the pleadings, and on the plaintiff's statement of claim he is claiming breach of copyright of a particular work, consisting of the six stanzas which have been published. I cannot assent to the proposition that, before he can maintain a claim of that kind, he is bound to produce some additional stanzas, with regard to which his statement of claim is silent, and with regard to which he makes no claim at all. It is the defendants' case, and not the plaintiff's.

Therefore, it seems to me that the plaintiff has, by the judge's order, been wrongly ruled out from establishing what is his pleaded case. The order actually made was an order giving liberty to the second defendants to inspect the document referred to in the affidavit of documents, including the part which the plaintiff wished to seal up, and it further ordered that, if he failed to produce the document for inspection, or failed to give notice of appeal in a stated period, the action should stand dismissed. He is, therefore, by that order put to the option either of doing what he swears will be the result, namely, incriminating himself, A or of having his action dismissed. In my opinion, having regard to the issues in the case, and the way in which those issues are raised, the plaintiff is entitled to proceed with his action, and is entitled to rely upon his affidavit saying that the matter of which inspection is asked will incriminate him, and the defendants are not entitled by discovery, B in order to establish their case, to call upon the plaintiff to incriminate himself. In my opinion, the appeal should be allowed.

ROMER, L.J.: Although we are differing from CLAUSON, J., there is not, I think, any disagreement between us and him as to the law C and the principles to be applied in the matter. We disagree with him only in the view that he has taken of the nature of the plaintiff's claim in this case. If the plaintiff asserts that he is the author of an unpublished poem, or of any other work, and that the defendant has infringed his, the plaintiff's, copyright in that work, it is quite plain that the plaintiff D will not be allowed by the court to refuse to disclose the manuscript of that poem or other work and at the same time to proceed to trial. Whether production of that work did or did not tend to incriminate the plaintiff, the court would put him into this position, that he would have to elect either to produce the work or to have his action dismissed. E Any other course would impose very considerable hardship upon the defendant, who, if that course were not pursued, would have to proceed to trial without having an opportunity of seeing the manuscript of the work the copyright in which he is alleged to have infringed. In the present case, if the pleadings are carefully examined, it will be found F that the plaintiff is alleging, in para. 1 of his statement of claim, that he is the author of a poem entitled *National Rat Week*, and, in para. 3 of his statement of claim, he says:

> The defendants have infringed the plaintiff's copyright in the said poem by causing, without the plaintiff's consent, the plaintiff's said poem to be printed G and published in *Cavalcade* [of a certain issue].

He therefore identifies the poem of which he says he is the author, the copyright of which he says the defendants have infringed, by a reference to the defendants' own paper. The work is thereby identified. That being so, the poem being an unpublished work, the plaintiff, in accordance H with the principles which I have just enunciated, would be compelled either to disclose the manuscript of that work, even though it incriminated him, or to have his action dismissed. The plaintiff has disclosed the manuscript of the poem he refers to in his statement of claim, and it will be in due course produced to the defendants, if it has not already been so produced. For these reasons, I think that the order of the judge ought to be set aside, and this appeal allowed.

MACKINNON, L.J.: I agree.

Appeal allowed with costs.

A Solicitors: *Frere, Cholmeley & Co.* (for the appellant); *Rhys Roberts & Co.* (for the respondents).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

B WILSON v. WRIGHT.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Romer and MacKinnon, L.JJ.), **November 12, 1937.**]

C *Sale of Goods—Rejection—Offer for "Saturday's steamer"—Acceptance for "next steamer"—Condition that goods be shipped on that steamer—Delay due to failure to load by shipowner.*

The seller offered for sale potatoes "for Saturday's steamer." The buyer accepted the potatoes by telegram, adding the words "next steamer," which was in fact "Saturday's steamer." The seller sent the consignment of potatoes to the docks in time for loading in the D ordinary way on the Saturday steamer, but that steamer was too heavily laden to take them, and they were delayed for two days at the docks. Prices having fallen in the meantime, the defendant refused to accept delivery:—

HELD: the defendant was entitled to reject the potatoes, as it was a condition of the contract that they should be sent by the Saturday steamer.

E **[EDITORIAL NOTE.** The general rule is that as regards the time of delivery the seller is bound to send the goods within a reasonable time, but the contract may state an express date for delivery. In the present case the seller argued that he had done everything possible to secure delivery at the specified date, and that the cause of the late delivery was one that he could not have foreseen. The Court F of Appeal, however, have held that in such circumstances the buyer was entitled to reject the goods, although the delay was very short.

AS TO TIME FOR DELIVERY, see HALSBURY, 1st Edn., Vol. 25, Sale of Goods, pp. 208-210, paras. 359-361; and FOR CASES, see DIGEST, Vol. 39, pp. 427-429, Nos. 571-588.]

Cases referred to:

G (1) *Bowes* v. *Shand* (1877), 2 App. Cas. 455; 39 Digest 425, *564*; 46 L.J.Q.B. 561; 36 L.T. 857.

(2) *Alexander* v. *Vanderzee* (1872), L.R. 7 C.P. 530; 39 Digest 425, *563*.

(3) *Maine Spinning Co.* v. *Sutcliffe & Co.* (1917), 87 L.J.K.B. 382; 39 Digest 546, *1562*; 118 L.T. 351.

(4) *Inglis* v. *Stock* (1885), 10 App. Cas. 263; 39 Digest 530, *1433*; 54 L.J.Q.B. H 582; 52 L.T. 821.

APPEAL from a decision of His Honour JUDGE L. C. THOMAS, given at the Cardiff County Court, on Feb. 3, 1937. By a series of letters and telegrams which are set out in the judgment of MACKINNON, L.J., the plaintiff contracted to send a quantity of potatoes by ship from Belfast, it being intended that the potatoes should be loaded on the Saturday steamer. The potatoes were sent to Belfast in good time for the Saturday steamer, but it happened that the steamer was too heavily laden for them to be loaded. The company, however, after a delay of two days, provided another steamer, on which the consignment was loaded. The defendant alleged that the price of potatoes had then fallen and refused to take delivery, and, in an action for the price of the potatoes, contended that, as this was a shipment f.o.b. by Saturday's steamer, the plaintiff was under a definite obligation to make the shipment by the steamer on the Saturday, in default of which the liability of the defendant would be either extinguished or diminished. The county court judge held that the plaintiff had done all he was required to do under the contract and that the expression f.o.b. did not amount in law to a warranty that the goods would be placed on board the steamer mentioned in the contract. He gave judgment for the plaintiff.

The defendant appealed.

Robert Fortune for the appellant.

H. L. Holman for the respondent.

Fortune : Wilson may have an action against the steamship company, but he cannot say he has fulfilled his contract. By the Sale of Goods Act, 1893, s. 27, it is the duty of seller to deliver in accordance with the terms of the contract of sale, and that was to put the goods on board. It was a sale of goods by description. They were to be " Saturday's steamer " goods. *Maine Spinning Co.* v. *Sutcliffe* (3).

Holman : This was a contract by which both parties contemplated that the goods should be put on board next Saturday's steamer : they were not put on board, but that was the fault of neither party. There is nothing to show that the seller was responsible for booking space in the steamer. His only undertaking was that the goods would be available in time for shipment by that steamer. Otherwise he would be undertaking something that he could not have known whether he would be able to perform or not. *Inglis* v. *Stock* (4) is an authority for saying that it is the buyer who has to provide an " effective " steamer, and the obligation to put on board does not devolve upon the seller until such steamer is provided.

MacKinnon, L.J. : All the material cases are those dealing with the date of shipment. Not those explaining " f.o.b.," which is a mere incident in this case. *Inglis* v. *Stock* (4) is a case where the buyer was chartering the ship ; but here you have a weekly ship. The whole point is that the seller has sold goods and annexed to them the description of " Saturday shipped " goods.

MacKinnon, L.J. (delivering the judgment of the court) : The question to be considered is within a very small compass. On Apr. 27, 1936, which was a Monday, the seller sent a telegram to the buyer :

> Your letter offer you for Saturdays steamer 10/15 tons [of a certain description of potatoes] f.o.b. Belfast Wire prompt deliveries small.

That is to say: "My deliveries to me from the farmer are not coming in very well, so I must load quickly." To that the buyer replied: "Send 10 Blues 10 tons Larnes Whites next steamer." The buyer confirmed that by a letter, which reads as follows:

> Thank you for your telegram of to-day and confirm my wire in reply booking A 10 tons of Larnes Whites and 10 tons Blues for shipment by the next steamer at 110*s.* f.o.b.

There was, therefore, an agreement for the purchase of potatoes to be shipped at Belfast. The potatoes were shipped, not on Saturday, May 5, but on Tuesday, May 8. On arrival, the buyer refused to accept B them, and in consequence they were held over in some way, and eventually, by agreement between the parties, they were sold at a loss of £46 odd as compared with the contract price. The whole question is whether or not the buyer was entitled to reject the goods as he did. This case arises because the seller brings his action for the purchase price of the C goods, and the buyer defends the action to the extent of the goods which he rejected. The question is: Was he entitled to reject those goods? He could do so only if there was, on the part of the seller, a breach of some term of the contract, which authorised the buyer to refuse to accept the goods. The ground upon which the buyer did purport to exercise D such a right to reject is that the goods, or part of them, were shipped, not on Saturday, May 5, but on Tuesday, May 8. In other words, he raises the question as to whether it was not a condition of this contract that the goods he purchased should be shipped on the steamer sailing from Belfast on Saturday, May 5. The result is that two questions E arise on the construction of the contract between the parties: (i) was it a stipulation of the contract that the goods must be shipped on Saturday, May 5, and, if there was such a stipulation, (ii) was it a condition of the contract a breach of which would entitle him to reject the goods? On that second question, if the first is answered in favour of the buyer, there F can be very little doubt. It depends on the provision in sect. 11 (1) (*b*) of the Sale of Goods Act. The matter depends, as in every case of this sort, upon the construction of the contract. There have been a great many cases which have decided that stipulations as to the date of the particular vehicle of shipment of goods are stipulations which amount G to a condition within that subsection. Therefore, the only real question here is: Was it a stipulation of this contract that the goods, as part of their description under the sale, must be goods shipped on May 5? That, really, is a very small point, though not a particularly easy one. The material words are: "That the goods sold are potatoes for shipment H by the next steamer." In the offer by telegram it is put "for Saturday's steamer," Saturday being the day on which the "next steamer" would sail, and in the acceptance it is put "next steamer." That is confirmed by the letter, which speaks of sales of potatoes "for shipment by the next steamer." That, I think, is assented to by the seller in his letter.

This is a very small point, and I have come to the conclusion that these words do amount to a stipulation that the goods shall be shipped by the next steamer, and, on the construction of the contract of sale, there is a condition that the goods shall be shipped on that steamer. A very similar question has arisen in a great number of cases, the best-known of which are *Bowes* v. *Shand* (1), at p. 460, and *Alexander* v. *Vanderzee* (2). In *Alexander* v. *Vanderzee* (2), which is perhaps the nearest case to this one, the words were : "Stipulation that goods were for shipment in a certain month. . . ." These words were held to amount to a guarantee that they should be shipped within that period.

The result is that I think the buyer was entitled to reject these goods, and that the decision of the county court judge, who held that he was not entitled to reject, was wrong. Therefore, this appeal should be allowed, with costs.

Solicitors : *Ingledew, Sons & Brown*, agents for *Moxon & Petty*, Newport, Mon. (for the appellant) ; *Kinch & Richardson* (agents for *Allen Pratt & Geldard*, Cardiff) for the respondent.

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

KASOFSKY *v.* KREEGERS (PHILLIPS, CLAIMANT).

[KING'S BENCH DIVISION (Goddard and Hilbery, JJ.), **November 15, 1937.**]

Execution—Seizure by creditor—Claim by receiver under debenture deed—Necessity for receiver to prove that power to appoint has arisen.

An execution creditor having seized certain goods of the debtor, the goods were claimed by a receiver appointed under a power given by a debenture deed. The appointment was dated the day after the execution of the deed. It was contended that such appointment was *prima facie* valid, and that it was for the creditor to show that none of the events specified in the deed as giving rise to the power had happened :—

HELD : it was for the receiver to prove the happening of one of the events so specified in the debenture deed, and the maxim *omnia rite esse acta praesumuntur* had no application to such a case.

[**EDITORIAL NOTE.** Where a receiver appointed by a debenture holder seeks to enforce priority over an execution creditor, the onus is on him to prove the validity of his appointment, if it is attacked by the creditor.

AS TO PRIORITY IN EXECUTION, see HALSBURY, Hailsham Edn., Vol. 14, pp. 147, 148, para. 229 ; and FOR CASES, see DIGEST, Vol. 10, pp. 761-763, Nos. 4763-4771.]

Cases referred to :

(1) *Evans* v. *Rival Granite Quarries, Ltd.*, [1910] 2 K.B. 979 ; 10 Digest 752, *4698* ; 79 L.J.K.B. 970.

(2) *Re Harpur's Cycle Fittings Co.*, [1900] 2 Ch. 731 ; 10 Digest 759, *4743* ; 69 L.J. Ch. 841 ; 83 L.T. 407.

APPEAL by the plaintiff from an order made by the master on Apr. 24, 1937, on the trial of an interpleader issue. The plaintiff, H. Kasofsky, obtained judgment against the defendant company, under R.S.C. Ord. 14, for £31 7*s*. 3*d*., the value of goods supplied to them. The order was drawn up on Mar. 9, 1937, and execution was levied upon the goods of the defendant company on the same day. Four days later, the plaintiff's solicitor was informed by the sheriff's officers that the goods which had been taken were claimed by Mr. Phillips, by virtue of his having been appointed receiver for the debenture holder of the defendant company. As this claim was not admitted, an interpleader summons was issued by the sheriff. At the trial of the issue, judgment was given against the plaintiff, and he appealed from the order of the master on the grounds that (i) the master misdirected himself and was wrong in law in finding (*a*) that the said goods were the goods of Kreeger Bros. & Co., Ltd., (*b*) that the claimant was entitled to the said goods, (*c*) that the claimant was receiver for the said company; (ii) there was no evidence of the goods claimed by the claimant herein; (iii) the alleged appointment of the claimant as receiver for Kreeger Bros. & Co., Ltd., was a nullity.

Saul Myer for the plaintiff.

David Weitzman for the defendants.

R. E. Borneman for the under-sheriffs of Essex.

Myer: The circumstances in which the debenture holder could appoint a receiver are set out in the debenture. The first instalment did not fall due until Apr. 22, 1937, and no receiver could validly be appointed before that date, yet the person appointed gave notice to the sheriff on Mar. 11, saying that he had been appointed receiver on Mar. 8. On that date, there was no power to appoint a receiver. There is no evidence that there was ever a valid appointment of a receiver, and the execution creditor is entitled to judgment upon the issue. [Counsel referred to *Evans* v. *Rival Granite Quarries, Ltd.* (1) and *Re Harpur's Cycle Fittings Co.* (2).]

Weitzman: By condition 7 of the debenture, power is given to the debenture holder to appoint a receiver. It is provided that the debenture holder's accountants shall have a right of access to the company's books, and that, if the accountants think the assets are in jeopardy, a receiver may be appointed. There is no need for there to be any evidence. I have put in the evidence of the appointment. It is not necessary to go through the debenture and say that such or such a circumstance has arisen. The debenture shows how a receiver can be appointed. The appointment speaks for itself, and it is *prima facie* evidence of the receiver's appointment. The master specifically found that the debenture holder was entitled to appoint a receiver. There was ample evidence before the master to prove that the goods were the property of the company. [Counsel referred to *Re Harpur's Cycle Fittings Co.* (2) and *Evans* v. *Rival Granite Quarries, Ltd.* (1).]

GODDARD, J.: In my view, this appeal must succeed, and I am content to put my reasons upon short grounds. The appeal arises from a judgment of Master BALL, and it is an appeal by an execution creditor who has taken the point that Mr. Phillips was not entitled to sue as a receiver for the debenture holder.

The circumstances are that on Feb. 13, 1937, a writ in the action was A issued and served. Four days afterwards, a debenture was granted by the company, or purports to have been granted by the company, to a Mrs. Rosenberg, who is said, according to the debenture, to have advanced £600 to the company. That debenture was not registered until after an order for judgment had been obtained under R.S.C. Ord. 14. B That was obtained on Mar. 1, 1937. The debenture was registered on Mar. 8. Judgment was signed on Mar. 9. On Mar. 8, the same day as the debenture was registered, a receiver was appointed. The lady lent the money after the action had been begun, and she appointed a receiver before the judgment was signed. The debenture provides, C by cl. 2:

> The company will until payment of the said principal sum pay to the debenture holder interest thereon at the rate of seven and one half pounds (£7½) per cent. per annum provided that if the company pays to the debenture holder the sum of £10 per week on the Monday of each week the first of such payments to be made on Apr. 22, 1937, by way of repayment of the said sum of £600 and interest and D that such instalments are not in arrear for more than 7 days the debenture holder will take no steps to enforce the security.

She could not take any steps to enforce the security for default of payment of the principal, because the date for payment had not arrived. Then it is provided that the principal money shall become payable E on the happening of any of the six events which are set out in cl. 5. Then, if the principal moneys shall become payable, the:

> debenture holder may appoint by writing a receiver and manager of the company and of the property charged upon such terms as to remuneration and otherwise as he shall think fit, and may from time to time remove any receiver and manager so appointed and appoint another in his stead. F

No one suggests that anything happened under cl. 5 giving the right to appoint a receiver. The next provision is:

> 7. The debenture holder's accountants shall have right of access to the company's books at any time and if the accountants report that the assets are in jeopardy then the debenture holder shall have immediate right to appoint a receiver. G

It seems a very odd state of affairs if this lady, when advancing her money, was not fully aware of the true financial position of the company; and that then the accountant was sent in to report if the assets were in jeopardy, as they obviously were at the time she lent her money. There H would be very good reason for saying that the whole of this debenture was really a sham. I am content with this. When the matter came before the master, it was perfectly clear that a point in issue in the case was whether the receiver had been validly appointed, and whether anything had arisen to justify the debenture holder in appointing a receiver. If one of the events which justified the appointment of a receiver had happened, then the appointment of the receiver crystallised the debenture holder's charge upon the assets, and gave the receiver a right to take possession. But, if nothing had happened to give the debenture holder a right to appoint a receiver, the fact that she wrote on a piece of paper that she had appointed a receiver does not crystallise her charge, nor does it give a right to the receiver to take possession of the goods. The only evidence given at the trial was that Mr. Kreeger put in a debenture, and then an accountant's clerk was called, and he produced the appointment of his principal, Mr. Phillips, as receiver. Not a word of evidence was given to show that there was anything to justify the appointment of Mr. Phillips as receiver. What is more remarkable is this. There had been some correspondence, and Mr. Myer had taken the objection that the clerk was not the proper person to produce the appointment. Then the solicitors for the judgment creditor wrote a letter saying that they were prepared to admit the appointment as evidence of the appointment of the receiver, but not that such appointment was valid. Still, no evidence was given of any fact which justified the appointment of a receiver. Mr. Weitzman says that it is not necessary for him to do so. For myself, I cannot understand that. This appointment purports to show merely that Mrs. Rosenberg appointed Mr. Phillips as receiver. It does not even purport to show that any fact had arisen to justify the appointment, even if it would be enough to show it if the document merely recited it. There was no evidence at all upon which the master could hold that Phillips had been properly appointed a receiver, and that he had thereby got a good title to the possession of the goods. It is one thing to write out a paper saying that one has appointed a receiver. Unless circumstances have arisen to entitle one to make the appointment, and something has happened to crystallise the charge, that will not effect anything. It might show that circumstances had arisen which entitled the debenture holder to crystallise her charge and that she had done so. As she has not, the receiver has not proved his case, and, in my view, the claim ought to be debarred. Mr. Weitzman has suggested that we ought to send the case for re-trial to give him an opportunity of calling some evidence. We do not think that we ought to do so. The receiver's clerk was called, and he could have been asked if he had reported that the assets were in jeopardy. The evidence must have been in the possession of the claimant at the time of the hearing. It would be quite wrong now to send the case back for further trial, quite apart from the costs, which will have to be paid in any event, and which I should think are far greater than the value of the goods in dispute. If he had evidence, and did not choose to give it, that is his affair. Therefore, the case fails. As another point has been raised, I merely say that there was no evidence before the master upon which he could say that there was in Mr. Phillips a possessory title to the goods.

HILBERY, J.: I agree, and will add only this, because I entirely agree with what has been said. The claimant had to establish a title which ousted that of the execution creditor to the goods which the sheriff had seized. The claimant said that his title was derived from a debenture and the action of the debenture holder, who, under the powers which had been given by the debenture, had appointed a receiver. In these circumstances, it was necessary, in establishing the claimant's asserted title, that the claimant should show that his appointment was an appointment which could lawfully be made in the exercise of the powers given by the debenture. In effect, all the claimant did to discharge that burden of proof was to produce the debenture, and to produce a written document which purported to be an appointment of himself as receiver for the debenture holder. I ought to refer to the terms and conditions of the debenture. If one considers those terms and conditions, it becomes perfectly apparent that, unless the conditions precedent to the appointment of the receiver were fulfilled at the time of the appointment, the receiver for the debenture holder was not even *prima facie* validly appointed, unless, as Mr. Weitzman said, one could rely on the maxim *omnia rite esse acta praesumuntur.* I add these words only because I want to say that the maxim has not, and never had, any application to a case where there is a person in the position of the debenture holder, and the right to appoint a receiver is made conditional upon certain express terms in that document. There is no presumption which will discharge him from proving that, if the appointment is made, the steps necessary to make a valid appointment have been taken. In my view, this appeal ought to be allowed, and I concur in the form of order which GODDARD, J., proposes.

GODDARD, J.: Mr. Phillips was the claimant, and we make an order on Mr. Phillips. The order will be that the appeal be allowed with costs, and there will be a direction to pay the amount to the execution creditor, together with the taxed costs of the issue, and also the sheriff's costs in the court below. There will be no sheriff's costs of this appeal. The execution creditor will pay the sheriff's costs in the court below, and have a remedy over against the claimant. Leave to appeal is refused.

Solicitors: *Harold Miller* (for the plaintiff, the execution creditor); *Bernard Simmonds & Co.* (for the defendants); *Patersons, Snow & Co.*, agents for *Gepp & Sons*, Chelmsford (for the under-sheriffs of Essex).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

DERMODY *v.* HIGGS & HILL, LTD.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Romer and MacKinnon, L.JJ.), **November 10, 1937.**]

Workmen's Compensation—Course of employment—Acts in emergency—No great danger—Stoppage of employer's work.

A workman was employed by the respondents in road-making. The driver of an engine belonging to his employers had difficulty in starting the engine, and the workman went to assist him. The engine backfired, with the result that the workman's wrist was broken. The county court judge found that, when the workman met with the accident, he was doing an act outside his employment, but one which was for his master's benefit. As, however, there was no emergency, the workman was not entitled to recover. The workman appealed :—

HELD : the act was one which was reasonable for a fellow-workman to do in the circumstances for the purpose of enabling his master's work to proceed, and the accident arose out of and in the course of the man's employment.

[**EDITORIAL NOTE.** The county court judge thought that there was here no emergency within the limited category of acts described by SCRUTTON, L.J., in *Culpeck* v. *Orient Steam Navigation Co., Ltd.* (1), but the Court of Appeal have preferred the definition of emergency given in *Menzies* v. *M'Quibban* (2), where it was said that an emergency is not necessarily an occurrence giving rise to great danger. It is here held to be sufficient that the employer's work is stopped so long as the matter which the employee goes out of his way to remedy remains unremedied.

AS TO ACTS IN EMERGENCIES, see HALSBURY, 1st Edn., Vol. 20, Master and Servant, p. 175, para. 367 ; and FOR CASES, see DIGEST, Vol. 34, pp. 293, 294, Nos. 2440-2446. See also WILLIS'S WORKMEN'S COMPENSATION, 30th Edn., pp. 60, 61.]

Cases referred to :

(1) *Culpeck* v. *Orient Steam Navigation Co., Ltd.* (1922), 15 B.W.C.C. 187 ; 34 Digest 293, *2445*.

(2) *Menzies* v. *M'Quibban* (1900), 2 Fraser 732.

APPEAL by the applicant from an award of His Honour JUDGE BENSLEY WELLS, given on July 7, 1937, at the Greenwich County Court.

Denis H. Murphy for the appellant.

J. Alun Pugh for the respondents.

SIR WILFRID GREENE, M.R. : In this case, the workman was employed by the respondents in road-making. On Jan. 1, 1937, he was at work on the road, and there was an engine, belonging to his employers, which was used to bring materials to the road for the purposes of the work. On that morning, something was wrong with the engine, and the driver was unable to start it, a very common phenomenon with that class of engine. He tried for some ten or fifteen minutes without success. The workman then did what was a perfectly reasonable thing for him to do, in the circumstances : he gave the driver a hand, by turning the handle. He said that he did it for five minutes, and the engine backfired. As a result of that, he broke his wrist. The sole question that arises on this appeal is whether or not the county court judge was entitled to hold, on the evidence, that the accident did not arise out of and in the course of the man's employment.

The question whether an accident arises out of and in the course of a man's employment is, of course, a question of fact, but that does not mean that every finding of that kind is one which cannot be inquired into in this court. If the arbitrator, in applying his mind to that question, has misdirected himself in law, then it is open to this court to examine his finding.

In the present case, the judge, in my opinion, has clearly misdirected himself. I find no obscurity in his note. His note makes quite clear both what he was finding in fact and what he conceived himself entitled to decide upon that finding, having regard to the authorities cited to him.

I should have said that there was one more piece of evidence which is material to this matter. The workman said: "If the engine had not been started, there would have been nothing to bring the material to us to work with." The county court judge's note of his judgment is this:

> I find that when the applicant met with the accident, he was doing an act which was outside his employment, but for his master's benefit.

Pausing there for a moment, Mr. Pugh would have us think that that sentence by itself concludes the matter, and that it must be construed as a finding that the accident which happened to the man did not arise out of and in the course of his employment. I cannot read that sentence as intended to convey that meaning. All that it means, in my judgment, is that the act which the workman was doing was not one of the kind of acts that he was employed and paid to do. He was employed to make roads, he was not employed to swing the handles of motor cars, whether belonging to his employers or to anybody else. That is as far as that finding goes, in my judgment. But that is not sufficient to decide the case, because, in this kind of case, the act in question *ex hypothesi* falls outside the class of thing which the man was employed to do. The question is whether or not, notwithstanding that circumstance, the accident does arise out of and in the course of his employment, within the meaning of the Act.

The county court judge's note goes on as follows:

> Having regard to the authorities, I think that is not quite enough to enable the applicant to recover here. I think there must be something in the nature of an emergency, of the kind indicated by SCRUTTON, L.J., in *Culpeck* v. *Orient Steam Navigation Co., Ltd.* (1).

The judge has made it quite clear, to my mind, in those two sentences that he regarded himself as bound by authority to exclude everything which did not fall within the limited category of acts described by SCRUTTON, L.J., in the case mentioned.

When I turn to the judgment of SCRUTTON, L.J., in that case, at p. 189, I find that what he says is this:

> There have been many cases where the servant of the employer has done something quite outside his ordinary duties, but has done that something in his master's

> interests, as, for instance, in the case of a fire, or of a thief stealing ship's stores. There have been many cases where the action of the servant has been justified by the general duty of protecting his master's interests in an emergency, although he has embarked on work which he has not been specifically engaged to do.

I have no doubt that SCRUTTON, L.J., in using that language, was not intending to confine this class of case to cases where there was something
A in the nature of an emergency, in the sense of some imminent danger to life or limb, or property, or something of that kind. The particular case with which he had to deal was one almost of that character, because it involved the action of a ship's cook in protecting some ladies on a vessel at Port Said from insult from a person on board. The language
B of SCRUTTON, L.J., in my opinion, cannot be read as intended to define any such limited class of case as being the only class which can be treated as falling within the principle.

I prefer to adopt the language of the LORD PRESIDENT in *Menzies* v. *M'Quibban* (2), at p. 735:

C
> An emergency is something which occurs unexpectedly. It does not necessarily mean an occurrence giving rise to great danger.

The county court judge, in my opinion, on the face of his note, quite clearly has read the observation of SCRUTTON, L.J., as an authority binding him to exclude the present case from the benefit of the Act,
D as it did not fall within what he conceived to be the limited character of emergency, which alone brings the case within the ambit of the Act. He has in that respect, in my opinion, clearly misdirected himself.

In order to come within the principle of the "emergency" cases, the act that the man does must be something which is reasonable and
E sensible, in the circumstances. That would in general exclude the case of a man who had undertaken some job which required, for instance, a very high degree of skill, and involved great danger to unskilled men. It would not in general be reasonable for a man to take on a job which he was obviously not fitted to do, or which would be dangerous to him,
F although, in some circumstances of emergency, even this might be reasonable. It would depend on the facts of each case. On the other hand, where the act is one which it would be obvious, and therefore reasonable, for a fellow-workman to do in the circumstances for the purpose of enabling his master's work to proceed, it appears to me
G that the principle will in general apply. The evidence in the present case was that the master's work, so far as it was to be performed by that lorry in bringing materials to the road, was stopped so long as the lorry was out of action. In that sense, there was a real emergency in the conduct and progress of the master's work. The appellant came to the
H rescue and did what was reasonable, and what was to be expected, in the circumstances.

In my opinion, on this evidence, the county court judge was bound to come to the conclusion that the accident arose out of and in the course of the man's employment. The case, I think, is a clear one of misdirection. The appeal must be allowed.

Romer, L.J.: I agree.

MacKinnon, L.J.: I agree. It seems to me that there are two classes of these cases. I observe that in Willis's Workmen's Compensation they are dealt with separately, the one at p. 57, and the other at p. 60. There are two classes, and the first kind of act, though not strictly one that the man is employed to do, may be treated as one within the scope of his employment, if it is a reasonable or necessary thing for such a workman to do. That was like the case of *Menzies* v. *M'Quibban* (2). But there is the second class of act, which is clearly not within the scope of his employment at all, but may be brought within it. It is an act done to deal with, or avert, an emergency threatening his employer's interests, as in such a case as *Culpeck* v. *Orient Steam Navigation Co., Ltd.* (1). If my chauffeur sees the gardener carrying a heavy ladder, which is obviously rather a heavy task for him, as some of his proper work, and lends him a hand, that comes within the first class, and is a reasonable and proper thing for him to do, because it is merely lending a hand to his fellow-workman. But, if the chauffeur attempts to seize a burglar whom he sees attacking the house, and is wounded by the burglar, that is not part of his employment, as not arising out of his employment as a workman. It is arising from an emergency, and done in the interests of his employer because of that emergency. The county court judge seems to me to have considered that this question of emergency must arise and be present in both these classes of cases. I think that it arises in the second class only, and not in the first class at all. I agree with the judgment of Sir Wilfrid Greene, M.R.

Appeal allowed. Award set aside and matter remitted to county court judge.

Solicitors: *Bryan O'Connor & Co.* (for the appellant); *Dennes & Co.* (for the respondents).

[*Reported by* Reginald Townsend, Esq., *Barrister-at-Law.*]

DRANSFIELD *v.* BRITISH INSULATED CABLES, LTD.

[King's Bench Division (Hawke, J.), **June 11, 14, 15, July 28, 29, 30, October 13, 1937.**]

Negligence—Latent defect—Breakage of ring causing death of workman—Liability of manufacturer—Opportunity for intermediate examination—Damages—Persons entitled to damages for loss of expectation of life.

The defendants were the manufacturers of a bull-ring, a ring through which an overhead trolley-wire passed, and which had been supplied to a local authority to be used in their overhead system of wires. An employee of the local authority, while working on the wires, was knocked from a wagon and killed by the breaking of the ring. The ring had not at any time been subjected to any test, either by the defendants or by the corporation. The plaintiff, the widow of the employee, sued the defendants, alleging that the breaking of the ring was due to the negligence of the defendants. She also sued as administratrix of her husband, and, as such, claimed damages for his loss of expectation of life :—

HELD : (i) although the defendants were negligent in the manufacture of the ring, and such negligence was the cause of the accident, there was an opportunity for intermediate examination of the ring by the local authority, which examination would have disclosed the defect. The defendants as manufacturers of the ring were not, therefore, liable in damages to the plaintiff.

(ii) if the defendants had been liable, the damages for the loss of expectation of life would have been £500, and this sum, under the Administration of Estates Act, 1925, s. 46, would be the absolute property of the widow.

[**EDITORIAL NOTE.** In this case the defendants, as manufacturers, escaped liability, by reason of the opportunity for intermediate examination. The judgment then goes on to assess damages upon the footing that that decision may not be correct. These damages include damages for the loss of expectation of life, following the decision in *Rose* v. *Ford* (10), and the judge expresses the opinion that this sum, being less than £1,000, is the absolute property of the widow, under the Administration of Estates Act, 1925, s. 46.

AS TO LIABILITY OF MANUFACTURER, see HALSBURY, Hailsham Edn., Vol. 23, pp. 632-634, para. 887 ; and FOR CASES, see DIGEST, Vol. 39, pp. 440-443, Nos. 693-724.]

Cases referred to :

(1) *M'Alister* (*or Donoghue*) v. *Stevenson*, [1932] A.C. 562 ; Digest Supp. ; 101 L.J.P.C. 119 ; 147 L.T. 281.

(2) *Grant* v. *Australian Knitting Mills, Ltd.*, [1936] A.C. 85 ; Digest Supp. ; 105 L.J.P.C. 6 ; 154 L.T. 18.

(3) *Earl* v. *Lubbock*, [1905] 1 K.B. 253 ; 36 Digest 63, *408* ; 74 L.J.K.B. 121 ; 91 L.T. 830.

(4) *MacPherson* v. *Buick Motor Co.* (1916), 217 N.Y. 382.

(5) *Farr* v. *Butters Bros. & Co.*, [1932] 2 K.B. 606 ; Digest Supp. ; 101 L.J.K.B. 768 ; 147 L.T. 427.

(6) *Otto* v. *Bolton and Norris*, [1936] 2 K.B. 46 ; Digest Supp. ; [1936] 1 All E.R. 960 ; 105 L.J.K.B. 602 ; 154 L.T. 717.

(7) *Brown* v. *Cotterill* (1934), 51 T.L.R. 21 ; Digest Supp.

(8) *Malfroot* v. *Noxal, Ltd.* (1935), 51 T.L.R. 551 ; Digest Supp.

(9) *Kubach* v. *Hollands* (*Allen* (*Frederick*) *& Son* (*Poplar*), *Ltd., Third Party*), [1937] 3 All E.R. 907 ; Digest Supp.

(10) *Rose* v. *Ford*, [1937] 3 All E.R. 359 ; Digest Supp. ; 106 L.J.K.B. 576 ; 157 L.T. 174.

ACTION under the Fatal Accidents Act, 1846, claiming damages in respect of the death of the husband of the plaintiff on behalf of herself and her three infant children. The plaintiff also claimed, as personal representative of her husband, damages for his loss of expectation of life, the right to which accrued to him before his death.

F. J. Tucker, K.C., and *W. H. Duckworth* for the plaintiff.

F. A. Sellers, K.C., and *R. Marven Everett* for the defendants.

HAWKE, J. : Henry Dransfield died in Bournemouth on Nov. 23, 1935, as the result of an accident, which took place on Nov. 19, 1935, while he was working for the Bournemouth Corporation, whose servant he was, on an overhead system of trolley-wires. The accident was due to the parting of a bull-ring, part of the plant used by the corporation for supporting overhead wires in connection with their omnibus system. The result of the parting of the bull-ring was to release certain wires held in tension, and the deceased was thereby swept from a height and thrown to the ground, whereby his skull was fractured. He died on the date named. The plaintiff, who is his widow, brought this action A originally on behalf of herself and their three children to recover damages under the Fatal Accidents Act, 1846. By an amendment, made on July 28, she was permitted to sue also as his administratrix, in order to recover damages sustained by him in his lifetime for the interference with his expectation of life. He died intestate. Letters of administration B had been taken out after the date of the writ, but the defendants agreed that the plaintiff's said claim should, nevertheless, be dealt with in this action. The defendants were well-known manufacturers of plant for use in such trolley-omnibus systems, including such bull-rings. The bull-ring in question, with others, had been purchased by the C corporation from the defendants, whom they recognise, to use their own expression, as "the best makers of overheads." The bull-rings were put into stock by the corporation, and used as required. The bull-ring in question remained unused until 27 days before the date of the accident, but, from that date, it served to uphold the trolley- D wires until it broke on the date stated. It was not part of the defendants' case that the bull-ring would have deteriorated during the period it remained unused.

The plaintiff brought her action, alleging that the breaking of the bull-ring was due to the negligence of the defendants in course of E welding it for the purpose for which it was used, and claiming, on the principle laid down in *M'Alister* (*or Donoghue*) v. *Stevenson* (1), that the defendants were under a duty to such persons, including her husband, as might be injured in the course of its use. The defendants denied negligence, and submitted, in the alternative, that they were, in the F circumstances of the case, under no duty to the deceased man, between whom and them there was no contractual relation. After hearing the evidence at very considerable length, I came to the conclusion that there was in the making of the bull-ring negligence which led to and caused the accident. Admittedly, the bull-ring was not a proper ring to G be doing the duty, but it was contended by the defendants that this fact was due to circumstances against which they could not reasonably have been expected to provide, an unprecedented condition, which, in a vast number of weldings, had never been known before. Secondly, its condition was one which ordinary tests would reasonably have disclosed. H They had not themselves made any test of the rings in question, nor had the Bournemouth Corporation done so.

I do not propose to refer to the evidence at large, but the facts proved before me depended mainly, first, on behalf of the plaintiff, on the evidence of Mr. A. G. Wood, of the metallurgical department of the

Sheffield testing works, who had for 32 years been engaged in the investigation of failures of products in the engineering and allied trades, and of materials used in them. For the defendants, the evidence depended on that of Mr. Lionel Bray Wilson, the head of their welding department for as long as 21 years, and on that of certain of their workmen, who had been engaged in the actual welding of the ring in question, and in the inspection of it, in course of the completion of the actual welding. According to these latter witnesses, everything done in the welding and completion of the ring had been carefully done, and properly inspected. Mr. Wilson, an expert, of course, was called to counter the evidence of Mr. Wood, and to explain how, consistently with due care, the accident could have happened under conditions for which the defendants ought not to be held liable. Mr. Wood made no claim to be an expert in the actual process of welding, but his knowledge of defects in the working of metals was very great. Moreover, he approached the question from an entirely impartial point of view, and with no preconceived notions. I was finally led to accept his evidence, and came to the conclusion that it necessarily showed that due care had not been exercised either in the actual welding of the ring or in the inspection, after the offset had been removed, or both. I think that in both cases due care was not exercised. I therefore find that the accident was due, as I have said, to the negligent work of those for whom the defendants were responsible. I want to say about Mr. Wilson that I am quite satisfied that he is a perfectly honourable gentleman, and that he believed, and persuaded himself, perhaps unconsciously, to believe, the truth of everything he said to me. He is certainly a gentleman of great experience, but I thought that he had unconsciously allowed himself to look for an explanation based on circumstances which he said were unprecedented, and that, in doing so, he had closed his eyes to the fact that there was a quite simple explanation of the defects which existed in the ring, as explained to me by Mr. Wood. The plaintiff went further, and, in facing Mr. Wilson's explanation, asked me to find that, if the view which he took were the true one, all such weldings ought to be tested before use, and before being sent out to purchasers, and that they were negligent in not doing so. I do not feel that I can make any finding on that. I do not think that it arises. Mr. Wilson's theory was based on the assumption that there had been no negligence in the preparation of the bull-ring. I think that there was. I do not feel that I have sufficient material to come to a conclusion as to whether or not there ought to be examination of every welding made in every manufacturers' work before it is sent out. As I think, however, that there was actual negligence in the welding, and in the lack of proper inspection in the course of the processes which took place after welding, I do not think that that question arises.

I think, therefore, that the plaintiff has established the first fact which she has to establish, namely, that this unhappy accident was due to the

negligence of those for whom the defendants are responsible, and it becomes necessary to deal with the second question which arises, namely, whether there was between the deceased man and themselves any relation such as to create a duty on the defendants to take care. I think I ought to say that, in arriving at my conclusion about the defects in this welding, I did so after hearing and considering most carefully A
the evidence of both those expert gentlemen. My conclusion is not based, I wish to say, on certain evidence, which was given in the course of the trial, under protest, by Mr. Sellers, as to possible defects in certain other bull-rings which were part of the same consignment. Such defects, if they existed, seem to me to be of a kind entirely different B
from the one with which I have to deal.

The decision of this case depends, on this point, on principles laid down in *M'Alister* (*or Donoghue*) v. *Stevenson* (1). LORD WRIGHT, in *Grant* v. *Australian Knitting Mills, Ltd.* (2), said, at p. 107, that no doubt many difficult problems would arise before the precise limits of C
the principle of *M'Alister* (*or Donoghue*) v. *Stevenson* (1) were defined, but I have to deal with them as I understand the principle now, and in connection with the facts of the particular case which is before me. What is the principle ? LORD ATKIN, after an exhaustive examination of all the cases on this subject, thus summed up his view in *M'Alister* D
(*or Donoghue*) v. *Stevenson* (1), at p. 599 :

> . . . a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer [or user, I add, because he was dealing with the consumer, but the principle applies equally] in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting E
> up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer [and I add, or user] to take that reasonable care.

LORD THANKERTON, while agreeing with LORD ATKIN, put the matter in an almost stronger form, at p. 603. LORD MACMILLAN agreed, and, in dealing with *Earl* v. *Lubbock* (3), put the distinction on the fact that, in *M'Alister* (*or Donoghue*) v. *Stevenson* (1), the retailers were merely F
the vehicle of transmission of the products to the consumer, and that, by the nature of the products, they were precluded from inspecting or interfering with them. In dealing with the case of *MacPherson* v. *Buick Motor Co.* (4), LORD MACMILLAN said that the duty depended on the knowledge of the manufacturer that the products would be used by G
persons other than the purchaser, and used without new tests. Later, he distinguished the case where between the user and the manufacturer there was interposed a party who had the means and the opportunity of examining the products before re-issuing them to the actual user from a case in which the goods were intended to reach the consumer in the H
condition in which they left the manufacturer, and the manufacturer took steps to ensure that they would do so.

In *Farr* v. *Butters Bros. & Co.* (5), SCRUTTON, L.J., dealing with the decision in *M'Alister* (*or Donoghue*) v. *Stevenson* (1), said that it was based on the fact that there was no opportunity of independent examination. Greer, L.J., referred to putting on the market a machine defective in such a way as no reasonable examination should be expected to discover, and to the necessity of the products being used at once, and before a reasonable opportunity for inspection, and stated his understanding that Lord Atkin, in *M'Alister* (*or Donoghue*) v. *Stevenson* (1), meant that, if the manufacturer in this case had left a reasonable possibility of examination, there would have been no duty.

To the same effect are the decisions in *Otto* v. *Bolton and Norris* (6), a decision of Atkinson, J. Although, in *Grant* v. *Australian Knitting Mills, Ltd.* (2), Lord Wright accepted Lord Atkin's principle as stated above, there are some criticisms as to whether "privity," the word used by Lord Atkin, or "control," the word used by Lord Macmillan, are very suitable words for the decision. He, of course, could not overrule, and did not desire to overrule, the principle of *Donoghue's* case (1), and it binds me.

I arrive, therefore, at the conclusion that the understanding of Greer, L.J., already referred to, of the judgment of Lord Atkin in *M'Alister* (*or Donoghue*) v. *Stevenson* (1) is a correct understanding, and applicable to the decision generally in that case. Mr. Tucker's contention was that the duty exists not merely where there is an opportunity of examination by the intermediate party, not merely when the form in which the products are sold to the purchaser is such that the purchaser is, so to speak, prevented from making an intermediate examination, but also where the manufacturer does not in fact contemplate, and need not reasonably contemplate, the intervention of intermediate examination, and that the manufacturer is liable, unless he can reasonably contemplate that anybody is going to make an intermediate test of an effective nature. I do not think that that is the principle laid down in *M'Alister* (*or Donoghue*) v. *Stevenson* (1). I think that the principle depends on opportunity of examination, and, however attractive I may think Mr. Tucker's contention, I do not feel that I am in a position to accept it. If it is to be accepted anywhere, it must be accepted elsewhere.

It was submitted that certain more recent cases—*Brown* v. *Cotterill* (7), *Malfroot* v. *Noxal, Ltd.* (8), and *Kubach* v. *Hollands* (*Frederick Allen & Son* (*Poplar*), *Ltd.*, *Third Party*) (9)—in some way showed that the decision in *M'Alister* (*or Donoghue*) v. *Stevenson* (1) had been modified so as to show that Mr. Tucker's contention was right in law. If those cases are inconsistent with my view of *M'Alister* (*or Donoghue*) v. *Stevenson* (1), I must not accept them. I must decide this case on my view of what *M'Alister* (*or Donoghue*) v. *Stevenson* (1) decides. I might say that, in *Malfroot* v. *Noxal, Ltd.* (8), Lewis, J., actually said that, in his judgment, new tests were not to be made, and inferentially I assume that Lewis, J., was taking about *M'Alister* (*or Donoghue*) v. *Stevenson* (1) the same view as that which I have taken.

With regard to *Kubach* v. *Hollands* (9), the way in which that case might have been material for my decision in this matter was with reference to the schoolmistress who kept the school at which the accident took place. The jury found that she had done nothing unreasonable, and the case against her does not appear to have been pressed, but my attention has been drawn to no material in the report on which I can find out how the decision came about.

Applying those principles to this case, the manufacturers were not in the habit of testing the rings before supplying them to purchasers. They took, and thought that they were right in taking, a chance, which is one of Mr. Wilson's answers given to Mr. Tucker in the course of cross-examination. They said, and I agree, that, with proper material—and the material of which this ring was made was perfectly proper—and careful workmen, there was really no danger in allowing welding to go out without further testing. But I cannot find in this case any evidence of any steps taken by them to prevent the purchaser from testing before retailing the goods, or requiring other persons to use them. It is not a case in which the use of intermediate tests, whether successful or not, would defeat the object of the supply. Tests could be applied which, if successful, would leave the product perfectly fit for use. There were, admittedly, tests which could easily have been made. The employees of the Bournemouth Corporation did not use them, because they said that they relied on the manufacturers, and that, if they purchased from the manufacturers rings, such as these were, of sufficient dimensions to bear the strain which would be put on them, they would be entitled to assume that the goods were perfect. The corporation had an engineering staff, and they certainly had sufficient opportunity to apply tests of which they knew. They had, in fact, an instrument called a dynamometer, actually suitable for testing strains on metals. It was not their habit, before this accident, to use this instrument for testing such things as bull-rings, though it was used in fact for testing more flexible portions of their system, but they could easily and well—I am using the words of one of their own witnesses—have used it before putting any of the bull-rings into use, and I understand that the use of such a test would have disclosed quite easily whether or not the weldings were fit for use.

I therefore think that there is lacking one of the factors which it is essential for the plaintiff to prove in order to substantiate her case, and, however much I may regret it, I must give judgment against her. I think that the onus of proof that the necessary relation exists lies on her, and I think that she has failed to prove such a relation.

In those circumstances, it is not necessary for me to assess the amount, or deal with the question under the Law Reform (Miscellaneous Provisions) Act, 1934, or the assessment of apportionment under the Fatal Accidents Act, 1846, in connection therewith. I think, however, that I had better do so, as others may take a different view from mine in this case. The facts were really very little in dispute. It was only the inference to be drawn from them that was disputed. One main fact, of course, was much in dispute. I said that I accepted Mr. Wood's view about it. It may be thought elsewhere that I am wrong, and therefore I hope that I shall facilitate matters if I say what I would have found if the plaintiff had been entitled to succeed. I should have assessed the amount under the Fatal Accidents Act at £2,340, and I should have given the wife £1,800 of that, subject to a matter which I must mention. To the girl, Ruby, I should have given £140, and to Harry and Alfred £200 each. That will make up the £2,340.

I said that, in dealing with the amount given to Mrs. Dransfield, I must subject that to something which I was about to mention. Under the Law Reform (Miscellaneous Provisions) Act, the deceased man, as decided in *Rose* v. *Ford* (10), had acquired in his lifetime a right of action for damages in respect of his loss of expectation of life, and, under that decision, the damages must be in addition to those for the pain and suffering which he incurred, which in his case was none, because he was practically never conscious after the moment of the accident. It is a most difficult amount to assess. The House of Lords recognised the difficulty in such a case, as is apparent from their judgment in *Rose* v. *Ford* (10). There are people who think, or who say that they think, that they are better off in Heaven than they would be in this life. There are all sorts of considerations which must be borne in mind. I can only do my best, and say that I think that £500 would satisfy this amount. There arises a further question as to what would happen to that £500. Under the Administration of Estates Act, 1925, s. 46, on an intestacy, a substantial amount of a man's estate goes to his wife, to the exclusion of everybody else. That would exceed the £500, and, as I understand LORD ATKIN in what he said in *Rose* v. *Ford* (10), that must go against the widow's portion, because it is something which has accrued to her by reason of her husband's death. It is not necessary for me to deal with that point. I have mentioned it so that the court above, if my decision should be set aside, will have its attention drawn to the fact.

There will be judgment for the defendants. The defendants are not to have any costs of calling witnesses for the purpose of refuting or testing the defective condition of the rings, and the plaintiff is to have the costs of the extent to which the trial was prolonged by calling such witnesses.

Solicitors: *Pattinson & Brewer* (for the plaintiff); *Carpenters* (for the defendants).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

PERRY *v.* SHARON DEVELOPMENT CO., LTD.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Romer and MacKinnon, L.JJ.), **November 16, 1937.**]

Sale of Land—House in course of erection—Certain fittings not fixed and some plastering still to be done—Whether complete house or in course of erection.

The plaintiff on Dec. 19, 1935, entered into an agreement for the purchase of a house stated to be " erected or in the course of erection." The balance of the purchase money was to be paid, and completion to be made, on Jan. 7, 1936, or " so soon thereafter as the premises shall be completely finished and ready for occupation." On Dec. 19, the house, in addition to the decorations, lacked such things as water-taps, baths, and grates, and the plastering of the walls of the dining-room and drawing-room was incomplete. The plaintiff actually went into occupation on Jan. 7, 1936. In May, 1936, he complained of various defects in the house, and in this action he relied upon an implied warranty that the house should be of the same standard of building and of finish as was the show-house, and, in any event, that the construction should be carried out in a proper, efficient and workmanlike manner. It was contended that this was the sale of a completed house, and that there was no implied warranty :—

HELD : this was a purchase of a house in the course of erection, and not a purchase of a completed house, and the plaintiff was, therefore, entitled to rely upon the implied warranty.

[**EDITORIAL NOTE.** It has been settled that, upon the sale of a house in the course of erection, there is an implied warranty that the house will be finished in a workmanlike manner ; but, in the case of the sale of a completed house, there is no implied warranty. It was strenuously argued in this case that this was a sale of a completed house, but it has been held on the facts, and with this holding the Court of Appeal is in complete agreement, that there was sufficient remaining to be done to make this the sale of a house in the course of erection.

AS TO IMPLIED WARRANTY ON SALE OF PROPERTY, see HALSBURY, 1st Edn., Vol. 25, Sale of Land, p. 297, para. 504 ; and FOR CASES, see DIGEST, Supp., Sale of Land, Nos. 2922a-2922c.]

Cases referred to :

(1) *Miller* v. *Cannon Hill Estates, Ltd.*, [1931] 2 K.B. 113 ; Digest Supp. ; 100 L.J.K.B. 740 ; 144 L.T. 567.

(2) *Bottomley* v. *Bannister*, [1932] 1 K.B. 458 ; Digest Supp. ; 101 L.J.K.B. 46 ; 146 L.T. 68.

APPEAL by the defendants from a judgment of His Honour JUDGE DRUCQUER given at the Willesden County Court on Feb. 23, 1937. The facts are stated in the judgment of SIR WILFRID GREENE, M.R.

Sergeant Sullivan, K.C., and *Robert Fortune* for the appellants.

Hector Hughes, K.C., and *J. C. Smuts* for the respondent.

SIR WILFRID GREENE, M.R. : In the autumn of 1935, the defendants, who are builders, were developing a building estate at Hendon, and the road in question, on which houses were being erected by them, is a road called Mollison Way. The plaintiff, in Oct., 1935, interviewed agents of the defendants, and, as a result of that interview, he entered into an agreement on Oct. 25 to purchase what in that document is described as :

All that piece of land being part of the vendors' estate at Stag Lane, Hendon,

> Middlesex, together with the dwelling-house and premises erected or in course of erection thereon and known or intended to be known as No. 198, Mollison Way.

Apparently he signed a written form of contract, and received in exchange a counterpart, not signed as a contract on behalf of the company, but with a receipt for £5 deposit, which he paid on that occasion, signed on behalf of the company over a 2*d*. stamp. No. 198 at that time was in course of construction, and next to it was a house intended to be No. 196, also in course of construction. In Nov., 1935, No. 196 had reached a certain stage of completion, which I need not define, because the county court judge has found the facts as to the condition of that house on Dec. 19, 1935, which is the really crucial date. On Dec. 19, 1935, the plaintiff had another interview with the agents, and, as a result of some discussion about the size of the garden of No. 198, it was suggested to him that he might prefer to take No. 196 instead. He agreed to that, and there was signed upon Dec. 19, 1935, another agreement, which was in precisely the same printed form as was the earlier one, but which recited that the plaintiff had paid a deposit of £30 (which was the original £5 deposit and a further £25, which he paid on that day). This agreement was for the sale and purchase of No. 196, described in exactly the same way as that in which No. 198 had been described, as:

> All that piece of land being part of the vendors' estate at Stag Lane, Hendon, Middlesex, together with the dwelling-house and premises erected or in course of erection thereon and known or intended to be known as No. 196, Mollison Way.

That agreement contained, as the earlier document had contained, a clause dealing with the date of completion. The only part of it that I need read is the first sentence, which is to the following effect:

> The balance of the purchase money and proportion of insurance premium shall be paid and the purchase completed at the office at Bank Chambers, 214, Bishopsgate, E.C.2, of Messrs. De Meza & Menasse, the vendors' solicitors, on Jan. 7, 1936, or so soon thereafter as the premises shall be completely finished and ready for occupation.

It was, therefore, contemplated that the completion should not take place until the house had arrived at the condition of being completely finished and ready for occupation, those words indicating what was meant by the word "erected" as distinguished from the words "in course of erection" to be found in the parcels. In other words, looking at this document, and fairly construing it, inasmuch as the house to which it applied was a house in course of erection, that erection would not be completed within the meaning of the contract until such time as the house was completely finished and ready for occupation. That was the subject-matter of the contract, and that was the nature of the thing which the vendor was proposing to sell to the purchaser.

It is convenient at this stage to read the finding of the county court judge as to the physical condition of the house on that date, Dec. 19, 1935. What he says is this:

> By that date No. 196, Mollison Way, had been partly constructed. The defendants maintained that it was completely constructed all but the decorations.

> I found that in addition to the decorations the house lacked such things as water-taps, baths, grates, electric meter, seat to the water-closet, moreover the plastering of the walls of the dining-room and drawing-room was not complete.

That is a finding of fact which is binding upon this court, and, moreover, there was ample evidence to support it.

The plaintiff actually went into occupation on, I think, Jan. 7, and he A has lived there ever since. At the beginning of May, 1936, he had occasion to complain of the condition of the house. Correspondence followed, and eventually these proceedings were instituted in the county court of Middlesex held at Willesden. It is not necessary to examine in any detail the nature of his complaints. It is sufficient to say that B he complained of a variety of matters, some of which may be described as structural—such as dampness in the walls, leaks in pipes, and smoke coming from imperfectly-constructed flues—and others as being of a kind pertaining more to decoration. The case he made was of this nature. He said that there was an implied warranty, or, alternatively, C that:

> there were implied terms of the said agreement as follows: (*a*) that the said house should be built of materials suitable and fit and proper for the purpose and that the work should be carried out in a proper efficient and workmanlike manner, and (*b*) that the standard of building and finish of the said house should be the same as that of the show-house.

D

I am not going to deal with the precise wording of those warranties, because it appears to me that, on the true construction of the agreement, the terms to be implied are to be found in the document itself. I will explain what I mean by that in a moment. It is to be observed that the plaintiff does not rest his case on any collateral verbal agreement E made between himself and the vendors or their agents. The sole question that arises is whether or not it is right in law to imply a term relating to the state in which the house was to be put before the vendors should be considered to have completed their bargain.

The county court judge has dealt with the matter of law only. He F has not gone into any of the details of the damage claimed, because that matter he was proposing to refer to a named architect to consider. Accordingly, in his judgment he dealt with the question of law only, and he held that the warranties, or terms mentioned in the particulars of claim, were to be implied, basing himself on *Miller* v. *Cannon Hill* G *Estates, Ltd.* (1). I propose to consider this case without reference to any authorities, for the moment. It is, of course, well settled that a vendor of a completed house, in respect of which there is no work going on and no work to be done, does not, in the absence of some express bargain, undertake any obligation with regard to the condition of that H house. It is further well settled that, quite apart from obligations in contract, there is no obligation in tort lying upon him in respect of want of proper care in the construction or in the condition of the house which he is selling. Indeed, the reason for that is obvious. Every contract must, of course, be construed with reference to the subject-matter with

which it is dealing, and, where a contract for the sale and purchase of a house is dealing with a house which is, in the contemplation of both parties, and to the knowledge of both parties, supposed to be a completed house, there is no room for the implication of any term as to the doing of further work upon it. But it seems to me that, where the contract is
A a contract relating to a house which is still in the process of being completed, where the vendors' workmen are still on the job, and particularly where the completion is not to take place until the house has arrived at the contemplated condition—namely, complete finish and readiness for occupation—there must be implied in that contract an undertaking
B that the house shall be in that condition. The very fact that the contract is a contract for the purchase of a house in course of erection, that the contract contemplates that it is not to be completed until the house has been erected, and contemplates that the degree or the state of erection which that is to mean is the complete finishing of the house and its
C readiness for occupation, makes it almost possible to say (and I am not sure whether it is not more correct to say) that, on the true construction of the contract itself, there is an express obligation to finish that house. For present purposes, however, it matters not which way it is put. When this contract is examined in relation to the facts of the case as
D found by the county court judge, there is, in my opinion, imported into it an obligation on the vendors to put the house into the contemplated condition of complete finish and readiness for occupation. The county court judge has found that that was not done. The extent to which it was not done is a matter which will have to be decided hereafter.

E It seems to me, therefore, on looking at this contract, and on applying the ordinary principles of construction, and on applying them with due regard to the state of facts existing at the time, that this is the effect of the contract. But it is said by Serjeant Sullivan, on behalf of the appellants, that no such undertaking can be implied, first, because he
F says that the only work remaining to be done was decorative work, and, secondly, because he relies on the authorities which establish the proposition to which I referred a moment ago, that, in the case of a completed house, there is no obligation to be implied with regard to its condition. The first one of those arguments is entirely displaced by the
G county court judge's finding of fact, and the second one is, with all respect to the argument, quite beside the point, because, as I say, it cannot be disputed that, in the case of a finished house, no such undertaking can be implied.

Serjeant Sullivan then referred to, and relied upon, *Bottomley* v.
H *Bannister* (2). That was a case where there was an express undertaking to complete the house and make it fit for habitation. In point of fact, the plaintiff in that case could not succeed upon that undertaking, for two very good reasons, one of them, mentioned by GREER, L.J., that the time for performance of that contract had not arrived, and the other one, on the facts, as SCRUTTON, L.J., I think, put it, because there was

no finding, and, in his view, no evidence, that the house was not fit for habitation. Accordingly, the only ground upon which the case could possibly, or even plausibly, be presented was on the ground, as it was put, that there was some obligation, apart from the contract, towards the plaintiffs in that case. That was negatived in that case, and that is the sole effect of the decision in that case. The case upon which the county court judge relied in this case was a decision of the divisional court in the case of *Miller* v. *Cannon Hill Estates, Ltd.* (1). That was a case where there was a collateral agreement which had been held to amount to a contract, and it was held by the divisional court that the jury was entitled to find that there was a contract. A further matter was discussed, where Swift, J., says in his judgment, at p. 120 :

> Indeed it seems to me that it is a matter of very little moment whether there was or whether there was not an express warranty as to the condition of the material or the nature of the workmanship which should be used in this house, because I think that it is plain from the whole of the facts of the case that the law will imply a warranty that the house which was to be built by the defendants for the plaintiff should be a house which was habitable and fit for human beings to live in.

Then Swift, J., deals with the case of an unfurnished house, and points out that there is no implied contract with regard to its condition. He goes on to say at p. 121 :

> The position is quite different when you contract with a builder or with the owners of a building estate in course of development that they shall build a house for you or that you shall buy a house which is then in the course of erection by them. There the whole object, as both parties know, is that there shall be erected a house in which the intended purchaser shall come to live. It is the very nature and essence of the transaction between the parties that he will have a house put up there which is fit for him to come into as a dwelling-house.

I am not sure (and it is not necessary to go into this question) whether some of the reasoning of the judge in that judgment commends itself to me, but, so far as concerns his conclusion as to the implication of a term in the contract in the case where it is dealing with a house in course of erection, I am in agreement with the general conclusion to which he came.

In the present case, I am quite satisfied to base my judgment on the true construction of this agreement as applied to the facts at its date, and, in my opinion, the obligation on the part of the vendors is that which I have said. The appeal must be dismissed.

Romer, L.J. : It is well-established by numerous authorities, to some of which Serjeant Sullivan has called our attention, that, in the case of the sale of a completed house, there is to be implied on the part of the vendor no warranty as to the house being in any particular condition. The same rule would apply in the case of an uncompleted house, which is the subject-matter of a sale, where the structure stands at the time of the sale. Where, however, the contract is for the sale of a house when completed, there is an implied contract on the part of the vendor, in the absence of there being any express contract as to the way in which the house is to be completed, that the house shall be completed in such a way that it is fit for human habitation. In my opinion, in such a case as that, it matters not that the house has already been partly constructed. It was, indeed, argued by Serjeant Sullivan that, in such a case, although a contract in relation to work thereafter to be done might be implied, there could by implication be thrown on the vendor no obligation to do anything further to work which had already been done. I do not take that view.

In the present case, the plaintiff, in the witness-box, deposed to the fact that there were holes in the chimneys, the presence of such holes resulting in smoke getting into the house, and that the walls had been so constructed that rain came through them into the house. In my opinion, an obligation was thrown upon the vendor, in those circumstances, to remedy those defects, because, unless and until he remedied them, the house would not be in a state fit for human habitation.

As has been pointed out by Sir Wilfrid Greene, M.R., the contract in the present case was not for the sale of a completed house, nor for the sale of the structure as it stood at the time of the contract, but for the sale of a plot of land with a house upon it, the house being described as a house "already erected or to be erected," and, in the clause dealing with the date of completion, it was provided that the balance of the purchase money should be paid on a certain date, "or so soon thereafter as the premises shall be completely finished and ready for occupation."

In my opinion, in those circumstances, there was an implied contract on the part of the vendors that, at the date of completion, the house should be in a state fit for human habitation.

I should like to make only one further reference to an argument which was addressed to us by Serjeant Sullivan, who said that the house was fit for occupation, as was shown by the fact that the plaintiff and his wife did in fact occupy it. As regards that argument, I will say only, by way of illustration, that, if a man is unfortunate enough to eat a bad oyster, it does not follow that the oyster was fit to eat. I agree that this appeal should be dismissed.

MacKinnon, L.J.: I agree. There is obviously a difference in kind between a contract for the sale of a house which is an existing and complete structure and a contract for the sale of an uncompleted house which has to be completed by the vendor. In the former case, quite clearly there is no implied undertaking by the vendor as to the fitness of the house or its condition. In such circumstances, the maxim *caveat emptor* clearly applies to the full when the purchaser inspects the house by himself, or by his surveyor, and makes up his mind as to its condition and fitness for occupation. The other type of house, a house only partly erected, or to be completed, is different in two respects. In the first place, the maxim *caveat emptor* cannot apply, and the buyer, insofar as the house is not yet completed, cannot inspect it, either by himself or by his surveyor, and, in the second place, from the point of view of the vendor, the contract is not merely a contract to sell, but also a contract to do building work, and, insofar as it is a contract to do building work, it is only natural and proper that there should be an implied undertaking that the building work should be done properly. I entirely agree that this appeal fails and should be dismissed.

Appeal dismissed with costs.

Solicitors: *De Meza & Menasse* (for the appellants); *Hanchett Copley & Hails* (for the respondent).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

GREER *v.* KETTLE.
Re PARENT TRUST & FINANCE CO., LTD.

[HOUSE OF LORDS (Lord Atkin, Lord Russell of Killowen, Lord Macmillan, Lord Maugham, Lord Roche), **October 14, 15, November 22, 1937.**]

Guarantee—Guarantee of secured loan—Whether security for loan a condition precedent—Usual clause for guarantors to be liable as principal debtors.

Estoppel—Estoppel by deed—Effect of recital.

By a deed of guarantee for the repayment of a loan of £250,000 and interest, which recited that the lenders had, at the request of the guarantors, advanced to the borrowers £250,000, upon security of a charge on certain shares, the guarantors covenanted, in the event of the borrowers failing to make the repayments provided for, forthwith to repay to the lenders the said sum of £250,000, with interest at the rate of 8 per cent. per annum. The deed further provided that, whatever the position between the lenders and the borrowers, the guarantors should be liable for all moneys due as principal debtors, and that they were not to be released from liability by reason of time being given by the lenders, or by their taking no steps to protect their securities. The shares above-mentioned were at no time secured, and had not in fact been issued. Upon default in repayment of part of the loan, the liquidator of the guarantors rejected the proof by the liquidators of the lenders, contending that the security of the charge on the shares was a condition precedent to the guarantee:—

HELD: (i) upon a true construction of the deed of guarantee, the guarantors were not bound by the guarantee, as the security of the charge on the shares was a condition precedent to the guarantee.

(ii) the recital in the deed was not binding upon the guarantors, who were not estopped from setting up the facts, nor from asserting the non-existence of a charge on the shares.

Order of Court of Appeal, [1936] 3 All E.R. 432, *affirmed.*

[**EDITORIAL NOTE.** The House of Lords have adopted the views expressed in the Court of Appeal as to the existence of the charge on the shares being a condition precedent to the enforcement of the deed sued on. The decision on the estoppel point, in which a recital of the existence of the charge was relied on, is also affirmed by the House, it being held to be clearly established that a recital shown to be wrong in fact, and included by a mistake not induced by the party seeking to prove the true facts, does not estop that party from proving and relying upon the true facts.

AS TO ESTOPPEL BY RECITAL, see HALSBURY, Hailsham Edn., Vol. 13, pp. 457-459, paras. 514-518; and FOR CASES, see DIGEST, Vol. 21, pp. 252-266, Nos. 769-856.]

Cases referred to:

(1) *Evans* v. *Bremridge* (1855), 2 K. & J. 174; 26 Digest 72, *517*; 25 L.J. Ch. 102; 26 L.T.O.S. 164; *on appeal* (1856), 8 De G.M. & G. 100.

(2) *Lainson* v. *Tremere* (1834), 1 Ad. & El. 792; 21 Digest 254, *790*; 4 L.J.K.B. 207.

(3) *Young* v. *Raincock* (1849), 7 C.B. 310; 21 Digest 287, *1018*; 18 L.J.C.P. 193; 13 L.T.O.S. 401.

(4) *Stroughill* v. *Buck* (1850), 14 Q.B. 781; 21 Digest 252, *771*; 19 L.J.Q.B. 209; 15 L.T.O.S. 22.

(5) *Bowman* v. *Taylor* (1834), 2 Ad. & El. 278; 21 Digest 257, *810*; 4 L.J.K.B. 58.

(6) *Clark* v. *Adie* (*No.* 2) (1877), 2 App. Cas. 423; 36 Digest 638, *1081*; 46 L.J.Ch. 598; 37 L.T. 1; *affg.* (1876), 3 Ch.D. 134.

(7) *Brooke* v. *Haymes* (1868), L.R. 6 Eq. 25; 21 Digest 73, *487*.

APPEAL from an order of the Court of Appeal (LORD WRIGHT, M.R., ROMER and GREENE, L.JJ.), dated Oct. 28, 1936, and reported in [1936] 3 All E.R. 432, reversing an order of BENNETT, J., made on Mar. 20, 1936, and reported in [1936] 1 All E.R. 641. The facts and the arguments are set out in the judgments.

Sir William Jowitt, K.C., *D. N. Pritt, K.C.*, and *Wilfrid Hunt*, for the appellants, the liquidators of Mercantile Marine Trust, Ltd.

Cyril Radcliffe, K.C., *Charles R. R. Romer, K.C.*, and *Hon. Charles Russell*, for the respondent, the liquidator of Parent Trust & Finance Co., Ltd.

LORD ATKIN: My Lords, I have had the opportunity of reading the opinions which are about to be delivered by my noble and learned friends LORD RUSSELL OF KILLOWEN and LORD MAUGHAM. I agree with them, and I have nothing to add. Perhaps I may also say now that my noble and learned friend LORD MACMILLAN has also had an opportunity of reading those opinions, and he also concurs in them.

LORD RUSSELL OF KILLOWEN: My Lords, the main question for our decision in this appeal is whether a company called Mercantile Marine Finance Corpn., Ltd. (to which I will refer, for brevity's sake, as Mercantile Marine), is entitled to prove in the liquidation of another company called Parent Trust and Finance Co., Ltd. (to which I will refer as Parent Trust), for a principal sum of £150,000, together with interest thereon. There are certain subsidiary questions in regard to interest, but these naturally arise only in the event of Mercantile Marine being entitled to prove for the principal sum.

The claim arises under an agreement of guarantee dated Mar. 20, 1929, and made between Parent Trust and Mercantile Marine, the guarantee relating to a sum of £250,000 which had been advanced by Mercantile Marine to a company called Austin Friars Trust, Ltd. (to which I will refer as Austin Friars), under an agreement of charge also dated Mar. 20, 1929, and made between Austin Friars and Mercantile Marine.

The case presents this feature, viz., that there is available no evidence of the circumstances in which the loan was made or the guarantee given, except what appears from the documents themselves. The documents and certain admissions by the parties are the only materials which we can consider in deciding this appeal.

By the agreement of charge, Mercantile Marine advanced the sum of £250,000 to Austin Friars ; Austin Friars agreed to repay it on June 20 then next, with interest at the rate of 8 per cent. per annum, and charged certain securities mentioned in the schedule thereto with the repayment of the said advance and interest. The schedule contained the following items :

> (i) 275,000 shares of £1 each fully paid in Iron Industries, Ltd. ; (ii) 50,000 ordinary shares of 10*s*. each fully paid in Retail Trade Securities, Ltd. ; and (iii) 25,000 ordinary shares of £1 each fully paid in Corporation and General Securities, Ltd.

The agreement of guarantee must be referred to in greater detail. In it, Mercantile Marine is called " the corporation," while the words " the guarantors " mean Parent Trust. It contains one recital only, which runs thus :

> Whereas the corporation have at the request of the guarantors advanced to the Austin Friars Trust, Ltd. (hereinafter called " the borrowers ") the sum of £250,000 on the security of a charge dated Mar. 20, 1929, on the shares particulars of which are set out in the schedule hereto.

The schedule is an exact repetition of the schedule to the agreement of charge, and therefore includes the 275,000 shares in Iron Industries, Ltd. The rest of the agreement consists of the following words :

> In consideration of the corporation having at the request of the guarantors advanced to the borrowers the said sum of £250,000 the guarantors hereby covenant with the corporation that in the event of the borrowers failing to repay the said sum of £250,000 and interest as provided in the said charge on June 20 next forthwith to repay to the corporation the said sum of £250,000 together with all interest due and to become due thereon or on any judgment which may be recovered hereunder at the rate of 8 per cent. per annum provided however that should the interest rate of the Bank of England at any time be increased from the amount prevailing at the date hereof whilst the said loan or any part thereof is outstanding then the interest secured thereby is to be increased by a similar amount and that whatever may now or hereafter be the position between the borrowers and the guarantors as sureties the guarantors shall be considered and be liable as principal debtors for all moneys secured by the said charge and that the guarantors and their successors shall not be released nor shall their liability hereunder be affected by time being given to the borrowers or by the corporation omitting or neglecting to protect the security created hereby or by the said charge or by any other arrangement or dealing between the borrowers and the corporation in reference to the said security or by any other act omission matter or thing whatsoever whereby but for this provision the guarantors as sureties only would have been so released.

It is this document, and this document alone, which is the foundation of the claim of Mercantile Marine. The subsequent events in no way affect the question of the liability of Parent Trust, but, for the sake of completeness, they should be stated. Austin Friars did repay £100,000 of the loan ; and on two separate occasions in the year 1929 Mercantile

Marine, at the request of Parent Trust, extended the time for repayment by Austin Friars of the balance of the loan for the time being unpaid, in consideration whereof Parent Trust covenanted with Mercantile Marine that the guarantee should remain in full force and effect in every respect for the reduced sum.

A Subsequently to these extensions of time, it was, for the first time, discovered that the 275,000 shares in Iron Industries, Ltd., had not been validly issued, and that, accordingly, the debt, the payment of which Parent Trust had guaranteed, had never been secured on any of those 275,000 shares. On the one hand, the fact that the 275,000 shares had B not been validly issued is admitted by Mercantile Marine ; on the other hand, Parent Trust do not dispute that Mercantile Marine believed that those shares were validly issued, and that they had obtained a valid and effectual charge thereon.

In these circumstances, it would seem that the legal rights and liabilities C of these parties depend upon the true construction and effect of the agreement of guarantee. Indeed, this view was not, I think, disputed by either side.

For Mercantile Marine, it was contended (i) that, upon its true construction, the agreement for guarantee states or postulates merely that D there has been executed by Austin Friars a document or paper answering the description given, viz., a document or paper bearing the particular date and purporting to charge the scheduled shares or stating that they were charged ; or (ii) alternatively, that, if, upon its true construction, the agreement for guarantee required that the loan to Austin Friars E should be a secured loan, then that requirement had been fulfilled, because the loan was in fact secured on the scheduled shares other than the 275,000 shares in Iron Industries, Ltd.

These arguments were advanced before your Lordships in all seriousness, but I confess that I find it difficult to treat them with equal gravity.

F As regards the first alternative, the agreement, according to its plain language, does not assert merely the execution or existence of a document or piece of paper which answers the description given. It asserts the existence of a security, and of a security more particularly described, viz., a security which consists of a charge on (amongst other shares) the G 275,000 shares in Iron Industries, Ltd. This is the plain meaning of the words used, and an appreciation of this plain meaning destroys also the alternative contention, which can be founded only upon the view that nothing is asserted beyond the fact that Austin Friars have given some security.

H Once it is realised that the debt which Parent Trust are undertaking to guarantee is a debt described as a debt the repayment of which by the principal debtor is secured by a charge on (amongst other shares) the 275,000 shares in Iron Industries, Ltd., the case (apart from the question of estoppel, to which I will refer) becomes, in my opinion, a simple one.

It is not a case, as BENNETT, J., seems to have treated it, of seeking to imply a condition the implication of which is alleged to be inconsistent with other provisions in the document. In other words, as ROMER, L.J., said, it is not a case of Parent Trust being released from a contractual engagement. It is a case of an attempt to impose upon them a liability which they have never undertaken. The only debt the repayment of A which by the principal debtor they undertook to guarantee was a debt secured by a charge on the 275,000 shares in Iron Industries, and a debt so secured never in fact existed. The language of KNIGHT BRUCE, L.J., in *Evans* v. *Bremridge* (1) may well be applied to the present litigants. In that case it was sought to make liable a surety who became a surety B on the footing that a co-surety would join in the covenant with him. The co-surety had not done so, and the surety was held to be under no liability. As KNIGHT BRUCE, L.J., truly said at p. 108: "The defendants seek to charge the plaintiff with a contract, into which he did not enter."

The alleged liability of Parent Trust having never existed, the appellants C cannot derive assistance from the concluding words of the agreement, which purport to provide that the liability of Parent Trust shall not be affected by the happening of the events therein specified.

From these conclusions Mercantile Marine seek to escape by relying upon the doctrine of estoppel by recital in a deed. They contend that D the recital which, on this view of the case, alleges that the debt of the principal debtor is secured by a charge on 275,000 shares in Iron Industries, Ltd., estops Parent Trust from alleging that the debt was not so secured, and that the result of applying this rule of evidence is that, on the evidence in the case, it is impossible to say that Parent E Trust are free from liability.

My Lords, in support of this view various authorities were cited, commencing with *Lainson* v. *Tremere* (2). That was a case decided at common law on demurrer. In an action on a bond the condition of which was stated to be the payment of the rent of £170 under a certain F indenture of lease, the defendant pleaded that the rent reserved by the lease was £140, and that he had paid that sum under the lease. The plaintiff made replication that the defendant had not paid the £170 mentioned in the condition. On demurrer to that replication, the replication was held to be good, LORD DENMAN, C.J., stating that in a court G of law the obligor was estopped from saying that the rent was not £170 a year, and that, upon the pleadings, the defendant could not get rid of the estoppel, with the result that there must be judgment for the plaintiff. How the difference between the two documents arose, or which was the correct sum in fact, is not stated. If, however, that H decision is relied upon as applicable to a case of a mis-statement arising from mutual mistake, or as an authority for the proposition that, in all circumstances, statements in deeds estop all parties to the deed from ever alleging and proving the true facts, I would not, speaking for myself, be prepared to accept it as authoritative at the present day. Indeed, if it were, serious inroads might be made in the jurisdiction to rectify deeds.

Later decisions, however, put the matter on what seems to be the sounder basis. In *Young* v. *Raincock* (3), COLTMAN, J., said, at p. 338:

> A . . . where it can be collected from the deed, that the parties to it have agreed upon a certain admitted state of facts as the basis on which they contract, the statement of those facts, though but in the way of recital, shall estop the parties to aver the contrary.

So, too, in *Stroughill* v. *Buck* (4), a recital in a deed between the plaintiff and defendant that money had been advanced by the defendant to one B Ogle was held to be the language of the defendant only, and not to estop the plaintiff from proving that no money had been so advanced: and it was stated that, where a recital is intended to be an agreement of both parties to admit a fact, it estops both parties, but it is a question of construction whether the recital is so intended.

C My Lords, approaching this document from that angle, I find no difficulty in saying that Parent Trust are in no way estopped. There is no trace in the language of the document of any agreement that a particular state of facts shall, whether true or not, be an admitted state of facts, or that the contract shall be based on that admission. The D recital is a statement as to matters which would normally be within the knowledge of Mercantile Marine and not within the knowledge of Parent Trust, viz., that Mercantile Marine had made a loan to Austin Friars and had obtained from Austin Friars the stated security. There is nothing before us to suggest that Parent Trust were present when those E transactions took place. It is no doubt true that Parent Trust requested Mercantile Marine to make the loan on the stated security, but that fact does not make the recital in any way the statement of Parent Trust, nor an assertion by them that there was a charge on the 275,000 shares. It is from first to last a statement by Mercantile Marine that they have F complied with a request of Parent Trust, i.e., a statement by Mercantile Marine that they have advanced £250,000 to Austin Friars on the security of the shares specified in the schedule, which include the 275,000 shares in Iron Industries, Ltd. There is nothing to estop Parent Trust from asserting the non-existence of a charge on those shares.

G For the reasons which I have endeavoured to indicate, I agree with the decision and reasoning of the Court of Appeal, and I would dismiss this appeal with costs.

In these circumstances, the subsidiary questions need not be discussed.

H LORD MAUGHAM: My Lords, the facts in this appeal have been sufficiently stated in the opinion of my noble and learned friend LORD RUSSELL OF KILLOWEN, and it is unnecessary to repeat them. As he has pointed out, the appellants raised two main points on the appeal, apart from a third point which arose on the construction and effect of the final clause of the guarantee of Mar. 20, 1929. My Lords, on these

contentions, I do not think I can usefully add anything to that which has been said by my noble and learned friend LORD WRIGHT in delivering the leading judgment in the Court of Appeal, and by my noble and learned friend LORD RUSSELL OF KILLOWEN. There was, however, yet another point raised by the appellants, namely, the contention setting up against the Parent Trust and Finance Co., Ltd., and their liquidator A
an estoppel by deed. Relying on the recital in the guarantee, which was to the effect that the Mercantile Marine Finance Corpn., Ltd. (the guaranteed company), had, at the request of the Parent Trust and Finance Co. (the guarantors), advanced to the borrowers (the Austin Friars Trust, Ltd.) the sum of £250,000 on the security of a charge dated B
Mar. 20, 1929, on the shares, particulars of which were set out in the schedule to the deed, they contended that Parent Trust were estopped from alleging that the said loan was not secured as stated in the recital, or that the charge was in any respect ineffective. A number of authorities was referred to in support of this contention. It is a point of C
considerable general importance, and I hope that your Lordships will pardon me if I examine with a little elaboration the particular doctrine of estoppel invoked in this case.

My Lords, it is, I think, worth pointing out that for over 200 years a recital in a deed was not considered to be so direct an affirmation as D
to amount to an estoppel: Co. LITT. 352. LAW OR A DISCOURSE THEREOF, by Sir H. Finch, p. 33. This doctrine was not distinctly overruled till the year 1834, when, in the cases of *Lainson* v. *Tremere* (2) and *Bowman* v. *Taylor* (5), it was held to be unsound. Both cases were argued on demurrer, and there was, therefore, no statement of the facts beyond E
that contained in the pleadings. In *Lainson* v. *Tremere* (2), the action was on a bond for £1,000. The condition recited that, by a lease of even date between the plaintiff's testator and the defendant, the testator demised premises to the defendant at the yearly rent of £170, and the condition itself was payment to the testator of that sum. This figure F
of £170 was no doubt a mistake, for the reddendum in the lease was for a sum of £140 only. The plaintiff, however, sued, not on the lease, but on the bond, and the court held that the defendant was estopped by the recital in the bond from saying that the rent was not £170 a year. The plaintiff accordingly was held entitled to judgment on that footing G
—a very remarkable result.

The case of *Bowman* v. *Taylor* (5), which was decided in the same year, calls for a little examination. The estoppel was founded on a recital in an indenture of May 10, 1824, containing a grant by the plaintiff of a licence to the defendants to use an invention for which the plaintiff H
had obtained letters patent in the form in use in 1824. The action was for breach of a covenant by the defendant to pay certain royalties. The defendant pleaded (amongst other things) that the plaintiff was not the true and first inventor, and that the supposed invention was not a new invention. The deed, however, recited that the plaintiff had invented

improvements, and had obtained letters patent for them, and the defendants were held estopped from denying that the plaintiff was the true and first inventor. There was, accordingly, judgment for the plaintiff. My Lords, I do not doubt the correctness of the result, but I do doubt whether the recital could properly be taken to be a statement on behalf of the licensee, who could have had little knowledge as to possible anticipations of the invention. The decision may be explained on the ground that the deed was entered into on the footing that the recital, whether true or not, must be taken, during the continuance of the licence, as true. The question of estoppel in relation to licences to use a patent has been the subject, since 1834, of nearly a score of decisions in varying circumstances, of which *Clark* v. *Adie* (*No*. 2) (6) is perhaps the most authoritative. The decision of the House of Lords in that case was not based on the narrow ground adopted in *Bowman* v. *Taylor* (5), but on the much wider ground that the licensee of a patent right is bound on the same principle and in the same way as a tenant who has taken a lease of lands from another, and who is estopped during the lease from denying his landlord's title.

It seems to be clear that, having so recently adopted the view that a recital might operate as an estoppel, the courts had not, at that time, worked out the qualifications which might prove to be necessary unless great injustice was to result. Subsequent cases laid down that the recital must relate to specific facts, must be certain, clear and unambiguous, and would not avail persons who were not parties or privies to the deed. In *Stroughill* v. *Buck* (4), at p. 787, following *Young* v. *Raincock* (3), another, and a very important, qualification was laid down. Patteson, J., in his judgment in *Stroughill* v. *Buck* (4), stated it thus, at p. 787:

> When a recital is intended to be a statement which all the parties to the deed have mutually agreed to admit as true, it is an estoppel upon all. But, when it is intended to be the statement of one party only, the estoppel is confined to that party, and the intention is to be gathered from construing the instrument.

My Lords, in agreement with the Court of Appeal and with the opinion of my noble and learned friend Lord Russell of Killowen, I think that this statement of the law is correct; and I also agree with them in coming to the conclusion that, upon the true construction of the recital contained in the guarantee of Mar. 20, 1929, read in conjunction with the charge of even date mentioned in the recital, the fair inference is that the recital is intended to be the statement of the Mercantile Marine, and not to be that of the Parent Trust and Finance Co., Ltd. The latter, accordingly, are not estopped from relying on the admitted fact that the charge was not secured on the 275,000 fully paid shares of Iron Industries, Ltd., for the simple reason that these shares had never been issued.

My Lords, this conclusion is sufficient for the determination of the present appeal. But it is easy to imagine a deed framed, perhaps by inadvertence, in such a way that such a conclusion, as a mere matter of construction, might be impossible, even in a case of a common mistake, and it seems to me to be desirable to point out that there was another road, not depending on a possibly ill-framed recital, leading more certainly, in such a case, to the same result.

Estoppel by deed is a rule of evidence founded on the principle that A a solemn and unambiguous statement or engagement in a deed must be taken as binding between parties and privies, and therefore as not admitting any contradictory proof. It is important to observe that this is a rule of common law, though it may be noted that an exception arises when the deed is fraudulent or illegal. The position in equity B is, and was always, different in this respect, that, where there are proper grounds for rectifying a deed, e.g., because it is based upon a common mistake of fact, then, to the extent of the rectification, there can plainly be no estoppel based on the original form of the instrument. It is at least equally clear that in equity a party to a deed could not set up C an estoppel in reliance on a deed in relation to which there is an equitable right to rescission, nor in reliance on an untrue statement, nor an untrue recital induced by his own representation, whether innocent or otherwise, to the other party. Authority is scarcely needed for so clear a consequence of a rectification order, or an admitted or proved right to D such an order. The well-known rule of the chancery courts in regard to a receipt clause in a deed not effecting an estoppel if the money has not in fact been paid is a good illustration of the equity view: see the cases cited in HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 10, pp. 283-287. The decision of LORD ROMILLY, M.R., in *Brooke* v. *Haymes* (7) E is even more closely in point, and it may be added that the statement of the law in that case appears never to have been doubted. The headnote begins as follows:

> A party to a deed is not estopped in equity from averring against or offering evidence to contravert a recital therein contrary to the fact, which has been intro- F duced into the deed by mistake of fact, and not through fraud or deception on his part.

In a simple case of this kind, it would be unnecessary, as that case shows, to counterclaim for rectification, though, in a case of any complexity, it would certainly be desirable to do so. G

Since the Judicature Act, 1873, the rule in equity must prevail. It would seem to be clear that the case of *Lainson* v. *Tremere* (2), if it were tried on the facts at the present day, would be differently decided, and that, in all those cases where the party against whom an estoppel by deed is sought to be raised has a right to rectification which would, so H to speak, destroy the alleged estoppel, or a right to rescission on equitable grounds, he has an answer to the estoppel which would not have been open to him at common law. In the present case, apart from the ground on which the estoppel was held to fail in the Court of Appeal, I have myself no doubt that the same result might have been reached on the simple ground that the recital was inserted, so far as the shares in question were concerned, by a common mistake, not alleged to have been induced by the Parent Trust and Finance Co.

My Lords, as I have said, I agree in all respects with the decision and the reasoning of the Court of Appeal, and I concur in the proposed motion.

LORD ROCHE: My Lords, I concur.

Appeal dismissed with costs.

Solicitors: *Simmons & Simmons* (for the appellants, the liquidators of the Mercantile Marine Finance Corporation, Ltd.); *Linklaters & Paines* (for the respondent, the liquidator of the Parent Trust & Finance Co., Ltd.).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

SUTHERLAND PUBLISHING CO., LTD. *v.* CAXTON PUBLISHING CO., LTD. (No. 2).

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Romer and MacKinnon, L.JJ.), **October 15, 18, 19, November 15, 1937.**]

Copyright—Infringement—Conversion—Limitation of action—Assessment of damages for conversion—Copyright Act, 1911 (*c.* 46), *s.* 10.

In an action for an alleged infringement of the plaintiffs' copyright in a certain publication, the plaintiffs claimed, *inter alia*, an inquiry as to (i) damages suffered by reason of the infringement, and (ii) damages for conversion. The defendants admitted the infringement and submitted to an inquiry as to what damages the plaintiffs had suffered, but they relied upon the Copyright Act, 1911, s. 10, and the Statute of Limitations in answer to the plaintiffs' claim:—

HELD (MACKINNON, L.J., dissenting): as a person can be liable for conversion without being an infringer, an action for conversion against a person who has not infringed is not within the Copyright Act, 1911, s. 10, and, therefore, in respect of a claim for conversion, the period of limitation is six years.

(ii) the date of the delivery to the purchasers, and not that of the order to bind, is the date of the conversion.

(iii) the damages for conversion was not the value of the articles converted—that is the unbound sheets—but their value when bound and sold, being estimated by taking that proportion of the selling price which the infringing matter bore to the whole book.

Decision of CROSSMAN, J. ([1937] 1 All E.R. 338) *reversed on the first two points and affirmed on the third.*

[EDITORIAL NOTE. In this appeal MACKINNON, L.J., has dissented upon the first point and has, therefore, on that point reached the same conclusion as did CROSSMAN, J. In the result the decision of CROSSMAN, J., as to the period of limitation and as to the date at which conversion takes place is reversed, but his method of estimating the damages is retained. The damages are, therefore, estimated on the selling price and not on the cost of printing and paper.

AS TO CONVERSION OF COPYRIGHT MATTER, see HALSBURY, Hailsham Edn., Vol. 7, pp. 591-593, paras. 917-919; and FOR CASES, see Digest, Vol. 13, pp. 219, 220, Nos. 565-573.]

Cases referred to:

(1) *Sutherland Publishing Co., Ltd.* v. *Caxton Publishing Co., Ltd.*, [1936] Ch. 323; [1936] 1 All E.R. 177; Digest Supp.; 105 L.J. Ch. 150; 154 L.T. 367.

(2) *Ash* v. *Hutchinson & Co. (Publishers), Ltd.*, [1936] Ch. 489; Digest Supp.; [1936] 2 All E.R. 1496; 155 L.T. 46.

APPEAL from an order of CROSSMAN, J., dated Jan. 14, 1937, and reported in [1937] 1 All E.R. 338. The facts and arguments are fully stated in the judgment of SIR WILFRID GREENE, M.R.

K. E. Shelley, K.C., and *G. T. Aldous* for the plaintiffs.

Hon. S. O. Henn Collins, K.C., and *E. J. Macgillivray* for the defendants.

SIR WILFRID GREENE, M.R.: The appellants are the proprietors of the copyright in a book entitled HEATING AND VENTILATING. In this action they complain of the infringement of their copyright by the respondents and conversion of infringing copies. That infringement, which was admitted in the defence, consisted in the reproduction of substantial parts of the book in the third volume of a work published by the respondents and entitled THE MODERN PRACTICAL PLUMBER. At the trial of the action, CROSSMAN, J., granted an injunction, and awarded to the appellants £50 damages in respect of the infringement. At a previous stage in the history of the action, this court held that damages for infringement and damages for conversion of infringing copies are cumulative, and not alternative, remedies, and accordingly CROSSMAN, J., awarded a further sum by way of damages for conversion. The appellants now say that the sum awarded—namely, £150—is too small, while the respondents say by their cross-appeal that it is too large. Each party complains of the principle upon which the judge assessed the damages, and one at least of the questions raised is both difficult and important. That question, to which I will turn at once, concerns the construction of the Copyright Act, 1911, s. 10, which provides as follows:

> An action in respect of infringement of copyright shall not be commenced after the expiration of three years next after the infringement.

CROSSMAN, J., held that the period of limitation prescribed by this section applies not merely to the claim for infringement but also to the claim for conversion, upon the ground (as I understand his judgment) that, as the action claims relief in respect of infringement, the section applies not merely to that claim but also to the additional claim based on conversion. He held, further, that, for the purposes of the section, "the infringement" was the printing of infringing copies, and accordingly he held that the appellants' claim in conversion was limited to copies printed within three years before the issue of the writ in the action, i.e., since May 2, 1932. Sect. 10 is the last of a group of sections the heading of which is *Civil Remedies*. This heading is not strictly accurate, since sect. 7 does more than provide a remedy. It creates the right which is the foundation of the claim for conversion, by vesting in the owner of the copyright the property in infringing copies. It provides as follows:

> All infringing copies of any work in which copyright subsists, or of any substantial part thereof, and all plates used or intended to be used for the production of such infringing copies, shall be deemed to be the property of the owner of the copyright, who accordingly may take proceedings for the recovery of the possession thereof A or in respect of the conversion thereof.

As was pointed out by this court in the previous appeal (1), the right thus created is something essentially different from copyright. The former is a right to corporeal property, the latter to incorporeal. The remedies also are different. In this connection, it is instructive to refer B to the Copyright Act, 1842, s. 15, by which the remedy for what is called, in the Act of 1911, "infringement of copyright" was a special action on the case. By sect. 23 of the same Act, which for the first time vested the property in pirated works in the proprietor of the copyright, the remedy was by action of detinue or trover. The two conceptions are C indeed fundamentally different, and each right, with its appropriate remedy, falls into a different category.

As I have referred to the Act of 1842, it is convenient to complete the examination of it. Sect. 26 prescribed a twelve-months period of limitation for proceedings in respect "of any offence that shall be committed D against this Act," the period running from the commission of the "offence." In the case of an action of trover or detinue brought under sect. 23, the "offence" would appear to have been the refusal of the person in possession of the pirated copy to deliver it up to the proprietor of copyright, upon a demand being made by him in writing, since the E making of such a demand is, by the section, made a condition precedent to the right to begin the action. The result, therefore, was that, under this Act, the same period of limitation—namely, 12 months—applied both to the action for infringement and to the action of trover or detinue. But the date from which the period began to run was different in each F case, being, as to the former action, the date of the infringement, and, as to the latter, the date of the refusal to deliver up.

The Act of 1911 was an amending and consolidating Act. I can sympathise with those who think it unlikely that the legislature in 1911 intended to alter the law by making the period of limitation different, G in the case of conversion, from that in the case of infringement, since no sufficient reason for the change suggests itself. But it is fair to point out that, even if sect. 10 can and ought to be construed so as to cover a claim in conversion, the result will be that the law has been altered in what seems to be a highly capricious manner. For the period of H limitation in respect of the claim would begin to run, not, as would be expected, and as was in effect provided by the Act of 1842, from the date of the act of conversion, but from the date of "the infringement," with which the act of conversion has no logical connection whatever, except in a case where the same act, e.g., a sale which constitutes an infringement under sect. 2 (2), is both an infringement and a conversion. I myself can find no guidance in speculation as to what the legislature probably intended in this amending and consolidating Act. Accordingly, I turn to a more detailed examination of its provisions, which latter must be interpreted according to the ordinary principles of construction. The Act of 1911 is drafted upon a principle different from that of 1842. Sect. 1 confers a number of sole rights which are included in the word "copyright," while sect. 2 (1) provides that copyright shall be : A

> . . . deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright.

I am unable to find in the word "deemed," in this or in any other B section in the Act (including, in particular, sect. 7), any special force which helps me in the solution of the present problem. Sect. 2 (2) enumerates certain further acts by the doing of which copyright is to be "deemed to be infringed," provided the person doing them has the knowledge required by the subsection. Infringement of copyright is C thus precisely defined. It is the technical statutory expression for certain acts done in derogation of the rights of the owner of the copyright. Those acts, and none other, constitute the statutory wrong of infringement ; and by no feat of interpretation of which I am capable can the word "infringement," when used in the statute, be made to D mean or to include any other wrong.

These, therefore, are the acts which constitute infringement. Here must be noted another act which is prohibited by the statute (sect. 14), but which is not an infringement of copyright. That act is the importation into the United Kingdom of copies of a copyright work as to E which the owner of the copyright gives notice in writing to the commissioners of customs and excise that he is desirous that such copies shall not be so imported. The importation of copies in contravention of this section is, in my opinion, emphatically not infringement of copyright, and that notwithstanding that, by sect. 35, they are included in F the expression "infringing copies," where used in the Act. The definition in question is as follows :

> "Infringing," when applied to a copy of a work in which copyright subsists, means any copy, including any colourable imitation, made, or imported in contravention of the provisions of this Act.

G

The person who innocently imports such copies, i.e., without the knowledge required by sect. 2 (1), and the person who has them in his possession in the United Kingdom, whether or not he knows that they were improperly imported, alike commit no infringement of copyright. Nevertheless, it is, in my opinion, incontestable that the moment they are H imported they become, by force of sect. 7, the property of the owner of the copyright, whose title to them comes into existence from the mere importation, without the necessity of any act of infringement by anybody. I can see no justification for reading into sect. 7 any limitation which would exclude them.

There is another question upon the construction of sect. 7 which has been debated, and that is whether or not, in the case of copies the making of which was an infringement, an action of conversion lies against a person, e.g., a bookseller, who has disposed of them in all innocence. I can find nothing in the language of the section to exclude such a case. According to the plain language of the section, as it appears to me, such copies in the bookseller's possession are to be deemed to be the property of the owner of the copyright, who can take proceedings to recover them. If the innocent bookseller has parted with them in circumstances which would amount to a conversion on his part, the section appears to me quite plainly to give a right to recover from him damages for that conversion. This was the expressed opinion both of LORD WRIGHT, M.R., upon the first appeal in this action (1), and of ROMER, L.J., in *Ash* v. *Hutchinson & Co.* (*Publishers*), *Ltd.* (2), at p. 501. With these opinions I respectfully agree. It is to be noticed that, in such a case, an action brought against the innocent bookseller would not be brought in respect of any infringement of copyright by him, since *ex hypothesi* he has not committed any infringement, although proof of infringement by the maker of the copies would be necessary in order to establish that they were infringing copies. In this latter respect, there is a distinction between this case and the case of the imported copies, since there no allegation of infringement need or can be made. I may add that the view that the innocent bookseller can be sued is confirmed by the language of sect. 23 of the Act of 1842, which gives a right of action against "any party who shall detain the same." If the conclusions above expressed are correct, there are four main types of action which may fall to be brought by an owner of copyright: (i) an action against an infringer claiming relief in respect of the infringement; (ii) an action against an infringer who has also converted the infringing copies, claiming relief in respect of both the infringement and the conversion; (iii) an action of conversion against a person, e.g., an innocent bookseller, who has converted copies the making of which was an infringement, but has not himself been guilty of any infringement; (iv) an action of conversion against a person who has converted copies which are infringing copies by reason of illegal importation.

I return now to consider the arguments addressed to us upon the construction of sect. 10. Several alternative constructions were suggested. First of all, it was said that the section applies to every action the right to bring which is conferred by the Act. Upon this construction, it would cover all four types of action enumerated above. This argument is really based upon the fact that sect. 10 forms one of the group of sections headed by the caption *Civil Remedies.* It is sufficient to point out, in answer to this argument, that by no process of interpretation can sect. 10 be made to cover the fourth type mentioned above, since an action of that type cannot by any stretch of language be called "an action in respect of infringement of copyright." Moreover, it would be impossible in such a case to fix the date as from which the period of limitation was to run, since there would not have been any infringement. I am unable to accept the view that " the infringement " from which the period would run would be the importation. As I have already pointed out, infringement in this Act is a technical word, with a defined meaning, and the fact that, for obvious reasons of convenience in definition, the statute includes, under the phrase " infringing copies," copies which have been illegally imported cannot convert into an infringement an act—namely, importation—which is not made an infringement by the statute. It is then said that sect. 10 applies to every case where an allegation of infringement by someone (not necessarily the defendant) must, of necessity, be made and proved before the cause of action can be established. This construction would cover the first three types mentioned above, but would exclude the fourth. There does not appear to be any valid reason why the legislature should have provided a period of limitation for the first three types different from that applicable to the fourth, which admittedly would be six years if the first argument is wrong. But, be that as it may, I am unable to see how an action of the third type (i.e., against the innocent bookseller) can, consistently with the plain meaning of words in the English language, be described as an " action in respect of infringement of copyright." It is suggested that some support for the argument can be extracted from the phrase " in respect of," particularly when contrasted with the words in sect. 6 (3), " action for infringement of copyright." I find myself quite unable to attach to so slight a difference in language consequences so far-reaching. If I were to accept this suggestion, I should be attributing to the legislature a gross misuse of language, and I am not prepared to do so. Moreover, it would be necessary to apply the same interpretation to sect. 8. That section provides that the only remedy is to be an injunction :

> . . . in respect of the infringement if the defendant proves that at the date of the infringement he was not aware and had no reasonable ground for suspecting that copyright subsisted in the work.

This language shows, in my judgment, that the section is contemplating, and contemplating only, an action in which the defendant is charged with infringement, and insofar only as the action is concerned with infringement. Such a construction of this section as would bring the innocent bookseller within its provisions so as to exempt him from a claim for damages for conversion would lead to absurd results. In the first place, what would be " the date of the infringement " ? Would it be the date when the infringing manuscript was made by the author of the infringing work, or the date when printing of the copies was authorised by the publisher, or the date when the publisher, if he knew of the infringement, committed an act of infringement under sect. 2 (2) by selling them to the bookseller ? Moreover, whichever of these dates be taken (unless it be the last—an unusual case), I can see no reason why the bookseller's ignorance of the existence of copyright, at the date of some act done by a third party, at a time possibly long before the bookseller came into the picture at all, should be the determining factor in giving him the benefit of the section. In my judgment, by no stretch of language can sect. 8 be extended to cover anything but a claim in respect of infringement by the defendant himself.

Lastly, it is said that, where a claim in conversion is coupled in the same action with a claim in respect of infringement, sect. 10 applies to both claims. This would cover the second type of action abovementioned, but not the third or fourth. One result of this construction would be that a plaintiff who, instead of joining the two claims in one action, brought two actions, as he would be entitled to do, there being two separate and distinct wrongs, would avoid the operation of the section in respect of the conversion claim. But there are, in my judgment, more fundamental objections to this construction. There is the objection already discussed in connection with sect. 8, that several acts of infringement may well have taken place before the conversion, to some of which acts the defendant may have been no party. In such a case, I can find no logical ground upon which "the infringement" from which the period runs is to be selected. Moreover, the act of conversion may have taken place long after the act of infringement. A publisher infringes who authorises the printer to print the infringing copies. Those copies he may sell long after the infringement, and he may sell them in batches with considerable intervals of time between them, yet the result would be that the three years would begin to run, not from the act of conversion, but from the earlier date, when the printing was authorised.

The results of the various constructions suggested on behalf of the respondents appear to me to be highly illogical and absurd. Nevertheless, this circumstance would not prevent the adoption of one or other of those constructions if, upon the true interpretation of the language used, it ought to be adopted. But, when I find that each of these constructions involves straining and glossing the language of the section in a manner for which I can find no warrant, I am compelled to reject them. In my opinion, the section means what it says. It is confined to claims in respect of infringement by the defendant. In respect of each act of infringement complained of (and the defendant may have committed several), the period runs from that act. This gives a clear and sensible meaning to the language used. If it be thought that the result is one which the legislature cannot well have intended, the explanation may lie in the fact that, in adopting a new scheme of drafting, by which "infringement" is defined as in sect. 2, the legislature overlooked the fact that, by using the word "infringement" in sect. 10 instead of the words "offence committed against this Act," which were used in sect. 26 of the Act of 1842, it was not covering the whole ground. But, however that may be, I find the words too plain and compelling to permit me to depart from what seems to me to be their natural meaning. The result is, in my opinion, that, in respect of the claim in conversion, the period is six years, running from the act of conversion.

This brings me to the next question : What was the act of conversion as at the date of which the value of the infringing copies ought to be ascertained ? The judge held that that act was the order to the binders to bind the unbound sheets which contained the infringing matter, and not, as the appellants contended, the delivery of the bound copies by the respondents to their purchasers. Having regard to my conclusion upon the cross-appeal, to be presently mentioned, this question has little practical importance in the present case, but my view with regard to it is that the delivery to the purchasers, and not the order to the binders, was the act of conversion. The delivery appears to me to be the first clear evidence of an intention on the part of the defendants to deal with the infringing copies in a way adverse to the plaintiffs. I think that the order to bind was equivocal, since it was not necessarily inconsistent with an intention to respect the plaintiffs' title. The point is necessarily an artificial one, in view of the fact that the defendants never had any idea that the plaintiffs had any title to the infringing copies.

On the cross-appeal, the defendants argue that the damages for conversion awarded by CROSSMAN, J., were ascertained upon a wrong principle. CROSSMAN, J., having held that the order to the binders was the act of conversion, proceeded to fix the value of the articles converted—namely, the unbound sheets—by ascertaining what they fetched when bound and sold—namely, 21*s.*—and deducting the cost of binding, 1*s.* He then fixed the proportion which the infringing passages bore to the whole at one-twentieth, a figure which is not disputed by either side, and, applying this result to the agreed number of copies printed and bound during the period of three years before writ, he arrived at a round figure of £150, which he awarded as damages for conversion. He rejected the defendants' argument that the basis upon which the value of the unbound sheets ought to be assessed was the cost of the paper and printing, or the price which the printer received for them. In my opinion, CROSSMAN, J., was right in rejecting this argument. The infringing matter, when printed, had, in addition to its inherent value as paper and print, a potential value derived from the fact that, when combined with other matter, as it was, the combined product had a value greater than the sum of its parts. This potential value was realised by the defendants' own acts, and to rule it out in calculating the value of the article converted is, in my opinion, wholly illegitimate. The argument, if accepted, as embodying the true principle upon which damages for conversion ought to be assessed, would lead to extraordinary results, of which I may give one example.

Many triptychs painted by old masters have, in course of time, been broken up, with the result that their three component parts have come into the possession of different owners. If these parts are re-assembled, the triptych, so restored to its original condition, has a far greater value than that of the sum of its component parts, taken separately. Yet, according to the argument, if a dealer, having got each of the parts into his possession, proceeded to fasten them together with hinges, and to convert them, by selling the triptych so reconstructed, each owner could recover in damages only the value of his piece, leaving the dealer entitled to keep the difference between the sum of those values and the far greater price realised for the triptych.

The defendants also claimed that deductions from the 20*s.* (the value of the unbound volume) ought to be made in respect of their overhead and other expenses, such as advertising and marketing. In my opinion, they are not entitled to have any such deductions made. These expenses were incurred in connection with the volume as a whole, and there is nothing to suggest that they would not have been incurred if the infringing matter had never been incorporated in it. The defendants are wrongdoers, and I cannot see any ground, on principle or authority, for apportioning these expenses.

In the result, the order of the judge ought, in my opinion, to be varied, by substituting for the sum of £150 the sum of £494. This sum is arrived at as follows: The agreed number of copies of Vol. III of The Modern Practical Plumber delivered and sold during the period of six years before writ was 9,881. The value of these copies was 21*s.*, from which must be deducted 1*s.* for binding. The proportion of infringing matter was one-twentieth, as found by Crossman, J., and, accordingly, the value of the infringing matter was $(9{,}881 \times 20) \div 20$ shillings, i.e., £494. As the total sum recovered exceeds the sum paid into court, the order as to costs should be varied by giving to the plaintiffs the costs of the action.

Romer, L.J.: It is provided by the Copyright Act, 1911, s. 7, that all infringing copies of any work in which copyright subsists, or of any substantial part thereof, shall be deemed to be the property of the owner of the copyright, who accordingly may take proceedings for the recovery of the possession thereof or in respect of the conversion thereof. It is provided by sect. 10 of the same Act that an action in respect of infringement of copyright shall not be commenced after the expiration of three years next after the infringement. The first question to be decided upon this appeal is whether this limit of three years applies to an action, by the owner of the copyright in a work, to enforce the rights given to him by sect. 7. In order to answer this question, it is, I think, necessary to consider, in the first place, what is meant in sect. 10 by "an action in respect of infringement of copyright."

"Copyright," for the purposes of the Act, is, by sect. 1 (2), defined as meaning the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever, and to do the other things that are specified in the subsection. Sect. 2 (1) of the Act provides, subject to a proviso which is immaterial for the present purpose, that copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by the Act conferred on the owner of the copyright, that is to say, performs any of the acts that are particularised in sect. 1 (2). The person who, without the consent of the owner of the copyright, does any of these things, even if he does them in ignorance of the owner's rights, commits an infringement. But, after an infringement has been committed, the work produced by the infringer may come into the hands of a third party. It is accordingly provided by sect. 2 (2) as follows :

> Copyright in a work shall also be deemed to be infringed by any person who (*a*) sells or lets for hire, or by way of trade exposes or offers for sale or hire ; or (*b*) distributes either for the purposes of trade or to such an extent as to affect prejudicially the owner of the copyright ; or (*c*) by way of trade exhibits in public ; or (*d*) imports for sale or hire into any part of His Majesty's dominions to which this Act extends, any work which to his knowledge infringes copyright or would infringe copyright if it had been made within the part of His Majesty's dominions in or into which the sale or hiring, exposure, offering for sale or hire, distribution, exhibition, or importation took place.

It is plain from this that, if a person who has not himself infringed the copyright within the meaning of sect. 2 (1) innocently sells, or exposes, or offers for sale, an infringing work, he does not thereby commit an infringement of copyright. The infringing work sold, or exposed, or offered for sale, would, however, by virtue of sect. 7, be deemed to be the property of the owner of the copyright, and such owner could take proceedings for the recovery of the possession thereof, or in respect of any conversion thereof. Consider now the case of an importer into this country, otherwise than for sale or hire, of a work which does not in fact infringe copyright, but which would infringe copyright if it had been made within the United Kingdom, such importation being made in breach of the provisions of sect. 14. In such a case, there has not been any infringement of copyright by anybody. The imported work, nevertheless, becomes the property of the owner of the copyright, by virtue of sect. 7, and such owner could take proceedings to recover possession of such work against the importer, for the work would be an "infringing" copy within the meaning of sect. 7, by virtue of the definition of "infringing" in sect. 35. But in neither of the cases that I have mentioned could the action taken by the owner of the copyright under sect. 7 be properly called an action for infringement of copyright within the meaning of sect. 6 (5) of the Act, for in neither case will the defendant have committed an infringement. But would the action in either case be an action in respect of infringement of copyright, within the meaning of sect. 10 ? In the case of an action against a person who had, let us suppose, innocently sold or imported a work that had been produced by a third party in infringement of copyright, the owner of the copyright would, in an action for conversion, have to prove the fact of infringement, and to that extent the action might perhaps be said to be one in respect of an infringement. But, in the case of an action brought against a person to recover possession of, or damages for the conversion of a work imported by him into the United Kingdom which does not in fact infringe copyright but merely would infringe copyright if it had been made within the United Kingdom, it would, in my opinion, be impossible to describe such action as proceedings in respect of infringement of copyright, even though the importation were made in breach of the provisions of sect. 14 of the Act. It seems highly improbable that the legislature intended one period of limitation to apply to an action under sect. 7 when infringement has in fact taken place and another period to apply to an action under the section when no infringement has been committed. This consideration alone induces me to doubt whether, by the reference to an action in respect of infringement of copyright in sect. 10, it was intended to cover an action under sect. 7 of the Act. My doubt is confirmed by this further consideration. The term of three years mentioned in sect. 10 runs from the date of infringement. In a case, therefore, of an action for conversion against a person who innocently sells an infringing copy, the plaintiff's claim will, if sect. 10 applies to such an action, be barred after three years from the date of the infringement, and the infringement in this case must be an infringement by some person other than the defendant, who has not committed any infringement himself.

Now take the case of an action against a person who has himself committed an act of infringement by, let us suppose, selling a work which to his knowledge infringes copyright. The work so sold may have been printed by one person, published by another, and finally sold by the defendant. The plaintiff in the action is entitled to recover damages against the defendant for his infringement of copyright by selling. He is also entitled to recover damages against the defendant for conversion. The action, regarded as a whole, is undoubtedly an action in respect of infringement of copyright. But there have been three infringements committed by three different people, two of whom are not parties to the action. Do the three years run from the infringement by the defendant or from the infringement by the printer or from the infringement by the publisher ? And, even if, in such a case, time runs from the defendant's infringement of copyright, from what date does time run in the case of an innocent purchaser from that defendant? This is a question that I find some difficulty in answering, and the difficulty in answering it makes me think that sect. 10 could not have been intended to apply to any claim founded upon sect. 7 of the Act. Finally, it is to be observed that sect. 8 also refers to proceedings taken "in respect of the infringement of the copyright in any work." It is there provided that, if, in any such proceedings, the defendant in his defence alleges that he was not aware of the existence of the copyright in the

work, the plaintiff shall not be entitled to any remedy other than an
injunction or interdict in respect of the infringement, if the defendant
proves that, at the date of the infringement, he was not aware, and had
no reasonable ground for suspecting, that copyright subsisted in the
work. This section, if applied to an action brought solely for the purpose
of recovering possession of, or damages for, the conversion of A
infringing copies, is nonsensical. If it did so apply, the plaintiff would
get no relief at all, if the defendant could satisfy the onus thrown on
him, for the plaintiff would not, and could not, in such an action, be
asking for an injunction or interdict in respect of the infringement.
Even if the defendant had the fullest knowledge of the existence of the B
copyright at the time he acquired possession of the infringing copies, or
converted them to his own use, the plaintiff would be defeated if the
defendant could show that he did not possess such knowledge at the date
of the infringement, a date that could possess no signification at all as
between the defendant and the plaintiff, whose property was in the C
possession of the defendant, or had been converted by him.

For these reasons, I respectfully differ from the conclusion at which
Crossman, J., arrived. In my opinion, the only statute of limitation
applicable to the plaintiff's claim for conversion is the Limitation Act,
1623. D

Upon the other questions arising upon the appeal and the cross-appeal, I have nothing to add to what has been said by Sir Wilfrid Greene, M.R.

MacKinnon, L.J.: I regret that, on the one point that is material E
to the fate of this appeal, I find myself driven to a different conclusion.

The plaintiffs are the owners of copyright in an original literary work
entitled Heating and Ventilating. They sued the defendants, alleging
that, in the third volume of a work called The Modern Practical
Plumber, the defendants had infringed their said copyright. By their F
statement of claim they claimed both damages for infringement and
damages for conversion under the Copyright Act, 1911, s. 7. The
defendants put in a defence admitting infringement, and offering to submit
to an inquiry as to damages for infringement, or, alternatively, as to
damages for conversion, impliedly asserting that these remedies under G
the Act were alternative, and not cumulative. Whether that was rightly
asserted was discussed as a question of law. Farwell, J., decided
that the defendants' point was a good one. The Court of Appeal overruled
him, and held that the two remedies were cumulative, and not alternative,
though they pointed out that, in assessing the two heads of H
damage, care must be taken that they were not allowed to overlap, so
as to permit to any extent a double recovery.

The case then came before Crossman, J., to assess the damages under the two heads, in accordance with the decision of the Court of Appeal. After a hearing that is reported to have occupied ten days, the judge reserved judgment. Two months later he announced his decision: £50 as damages for breach of copyright, and £150 as damages for conversion—£200 in all. This the judge (surely with an excess of modesty, considering the industry he had expended) described as *rusticum judicium.* Under the ingenious modern system by which a judge is not allowed to know that a defendant has paid money into court, nor to know the amount of such payment, the spice of a gamble may now be added to the joys of litigation. When £200 was announced as the damages found under both heads, counsel for the defendants was able to inform the judge that they had won the costs game, since they had paid £251 into court, and the defendants got the costs of the action subsequent to the payment in.

It is obvious that, by this time, the costs of the litigation were a matter of far greater importance than was any vindication of the originality of the literary work entitled HEATING AND VENTILATING. The plaintiffs had the greatest interest in seeking to establish that £200 for the two sets of damages was too low, and that the figures should be at least something above £251. The present appeal was therefore brought. The plaintiffs contend that £150 as damages for conversion was too low, and was so because CROSSMAN, J., went wrong in the law. He held that, by virtue of the Copyright Act, 1911, s. 10, a claim for damages for conversion under sect. 7 was subject to the limitation of three years. The plaintiffs say that this is wrong, since sect. 10 does not apply to a claim under sect. 7. The defendants had appropriated a substantial part of the plaintiffs' original literary work entitled HEATING AND VENTILATING more than three years before the issue of the writ. The judge gave damages for conversion for what they did in those three years only. But, if their doings before the three years were taken into account, and if the formula accepted by the judge for assessing the damages were applied, the resulting damages would be considerably more than £201. If this be added to the £50, damages for breach of copyright, the defendants will have lost the costs game.

The plaintiffs having given this notice of appeal, the defendants delivered a cross-notice of appeal. Their contention is that the judge went wrong in law in assessing the quantum of damages for conversion. He gave the plaintiffs such proportion of the market value of the defendants' publication, Vol. III of THE MODERN PRACTICAL PLUMBER, as the amount of material filched from the plaintiffs bore to the whole contents of that partly-piratical publication. The defendants say that this is wrong, and that he should have given only the value of the matter appropriated before its incorporation with matter written by or for the defendants. This, obviously, would be very small. I suspect that the purpose of this cross-appeal (though the purpose was not avowed) was only to counteract the possible success of the plaintiffs' appeal. If the three-year limit were held not to be applicable, it might still be possible, with the quantum of damage for each appropriation reduced, that the damages for conversion might be kept below the all-important figure of £200.

I turn to the consideration of the plaintiffs' appeal. The Copyright Act, 1911, s. 1 (2), provides:

> For the purposes of this Act, "copyright" means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever, to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public; if the work is unpublished, to publish the work or any substantial part thereof . . .

Sect. 2 (1) provides:

> Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright: Provided that the following acts shall not constitute an infringement of copyright . . .

Sects. 6-10 are included under a cross-heading, *Civil Remedies*. Sect. 6 (1) provides:

> Where copyright in any work has been infringed, the owner of the copyright shall, except as otherwise provided by this Act, be entitled to all such remedies by way of injunction or interdict, damages, accounts, and otherwise, as are or may be conferred by law for the infringement of a right.

Sect. 7 provides:

> All infringing copies of any work in which copyright subsists, or of any substantial part thereof, and all plates used or intended to be used for the production of such infringing copies, shall be deemed to be the property of the owner of the copyright, who accordingly may take proceedings for the recovery of the possession thereof or in respect of the conversion thereof.

Sect. 10 provides:

> An action in respect of infringement of copyright shall not be commenced after the expiration of three years next after the infringement.

The plaintiffs in this case are bringing an action for infringement of copyright. They claim damages for that infringement under sect. 6 (1). They claim also damages for conversion under sect. 7. It is argued that it is only insofar as the remedy claimed is under sect. 6 (1) that there is an action in respect of the infringement of copyright within the provision of sect. 10. But insofar as, in this action, the remedy claimed is under sect. 7, this is not "an action in respect of infringement of copyright" within sect. 10, and, as regards the part of the claim for that remedy, the limitation of three years in sect. 10 does not apply. I cannot accept this contention. I think that the limitation of three years in sect. 10 does apply to the remedy claimed under sect. 7. With the reasons given by CROSSMAN, J., for coming to that conclusion I am not sure that I quite agree. He seems to have said that, in this case, the plaintiffs were undoubtedly bringing an action in respect of infringement of copyright, for they were claiming damages under sect. 6 (1) as well as under sect. 7. There is only one action, though two sorts of relief are claimed in it, and, as the one action is clearly in part "an action in respect of infringement of copyright" under sect. 10, that action cannot be commenced after the expiration of three years.

With one aspect of this reasoning I do agree. It seems to me that the damages for breach of copyright and the damages for conversion are complementary the one of the other, and that together they make good the totality of the loss inflicted on the owner of an infringed copyright. Speaking broadly, damages for infringement are what a plaintiff has lost by the diversion of his customers to the defendant's publication, while damages for conversion are what the defendant has gained by selling the plaintiff's property. If, for breach of his copyright, the owner of it has two remedies, which together compensate him for the totality of the loss inflicted on him, it seems to me most improbable that the legislature can have had any reason to fix, or can have intended to fix, one period of limitation (three years) for the damages for breach of copyright and a longer period (six years) for the damages for conversion. But the reasoning of Crossman, J., would afford no solution of the problem, if the plaintiffs had not claimed an injunction, and had not claimed damages under sect. 6 (1), but had claimed only damages under sect. 7. If this had been so, I should still be of opinion that sect. 10 would apply to impose a three years' limitation to their claim.

In an action in that form, the plaintiffs must plead that they are the owners of the copyright in their book, that the defendants have infringed it, and that therefore the plaintiffs are entitled to damages under sect. 7. This would clearly be "an action in respect of infringement of copyright," though the remedy claimed was only damages for conversion, given by the statute as one of the remedies for such infringement. Sect. 7 opens with the words "all infringing copies." The adjective necessarily involves that each copy is "an infringement." Of what is it an infringement? I think that clearly it is an infringement of copyright, which is the subject-matter of the statute. The words continue, "all infringing copies of any work in which copyright subsists." In truth, they might as well be, "all copies which infringe the subsisting copyright of any work." If that be so, a claim under sect. 7 seems to be clearly an action in respect of infringement of copyright within sect. 10.

There is another aspect of this. If "an action in respect of infringement of copyright" in sect. 10 means *only* a claim for damages for breach of copyright, and does not include a claim for damages for conversion, the same special meaning must be given to the words in sect. 8, "proceedings in respect of the infringement of the copyright in any work." Sect. 8 provides that, if, in any such proceedings, a defendant proves certain things (which, incidentally, I should think could very rarely be proved), the plaintiff shall not be entitled to any remedy other than an injunction. But, if the words in sect. 10, and the almost identical words in sect. 8, apply only to a claim for damages under sect. 6 (1), but do not apply to a claim for damages for conversion under sect. 7, then sect. 8 would afford the defendant who satisfied its condition no defence to a claim under sect. 7. All these sections are under the heading *Civil Remedies.* Such remedies are really threefold: (i) injunction,

(ii) damages for infringement of copyright, (iii) damages for conversion. If the appellants' contention is correct, the *effect* of sect. 8 is that a defendant who satisfies the condition will be liable for (i) injunction, and (iii) damages for conversion, but that he will be relieved of (ii) damages for breach of copyright. It seems an odd way to achieve this result to enact that the plaintiff shall not be entitled to *any* remedy (this being A one of the five sections dealing with *Civil Remedies*) other than an injunction.

So far, I have been considering only those sections about civil remedies which are directly relevant to this question. But the strength and plausibility of the appellants' argument is derived from another part of B the Act. Sect. 14 is headed *Importation of Copies*. I need read only the first subsection of it. Those copies are not to be imported, but, outside the United Kingdom, it may not be possible to call them "copies that infringe copyright," for they may be created in a place in which sect. 2 (1) of this Act is inoperative. Among the definitions in sect. 35 C (1) of the Act is this:

> "Infringing," when applied to a copy of a work in which copyright subsists, means any copy, including any colourable imitation, made, or imported in contravention of the provisions of this Act.

That has two limbs, "copies made in contravention of the provisions D of this Act," and "copies imported in contravention of the provisions of this Act." This latter must mean copies imported in contravention of the prohibition of sect. 14, and some, at least, of the copies of which importation is so prohibited may be copies which cannot be said to be in infringement of copyright, because they were produced or reproduced E in a place where sect. 2 (1) has no effect. Sect. 7 speaks of "infringing copies." It appears, therefore, that infringing copies may include some copies that are not strictly an infringement of copyright. It may be that it is for that reason that sect. 7 speaks of "all infringing copies of any work in which copyright subsists," instead of the more natural F phrase "all copies which infringe the subsisting copyright in any work."

The argument based on this passage in sect. 35 is this. Sect. 7 speaks of "all infringing copies." Some infringing copies, by virtue of the second limb of sect. 35, cannot be said to be "copies infringing copy- G right." A claim as to such copies under sect. 7 cannot be said to be "an action in respect of infringement of copyright." Sect. 10, therefore, cannot apply to such a claim as to such copies. If sect. 10 cannot apply to a claim about some infringing copies under sect. 7, it cannot apply to a claim as to any infringing copies under sect. 7. Therefore H it cannot apply to the present claim. I agree that there is much weight in this argument, and I think that the definition in sect. 35 does create great difficulty, but I do not think that the argument ought to prevail. I am quite sure, from a perusal of sects. 6-10, that the legislature must have intended sect. 10 to apply to a claim under sect. 7 as well as to a claim under sect. 6 (1). The question is whether the few words of the definition in sect. 35 compel me to defeat that intention. I do not think that they do. " Infringing copies of any work in which copyright subsists " clearly postulates that such copies are an infringement of something, and that something, having regard to the whole subject-matter of the Act, must be copyright. The difficulty arising from the later words of the definition—" Infringing copies . . . means copies imported in contravention of " sect. 14—would not arise if the passage had read : " Copies of a work in which copyright subsists, if imported in contravention of sect. 14, shall be deemed to be infringements of such copyright." Considering the affection that the modern draftsman appears to entertain for the word " deem," I am rather surprised that it was not used here.

When the purpose of an enactment is clear, it is often legitimate, because it is necessary, to put a strained interpretation upon some words which have been inadvertently used, and of which the plain meaning would defeat the obvious intention of the legislature. It may even be necessary, and therefore legitimate, to substitute, for an inept word or words, that which such intention requires. The most striking example of this, I think, is in one passage in the Sea Carriage of Goods Act, 1924, where, to prevent a result so nonsensical that the legislature cannot have intended it, it has been held necessary and legitimate to substitute the word " and " for the word " or." The violence of this operation has, I think, been minimised by saying that, in this place, the word " or " must be taken to mean " and." That is a cowardly evasion. In truth, one word is substituted for another, for " or " can never mean " and." It appears to me that, having regard to the various passages to which I have referred, some violence of interpretation must be applied somewhere to this Copyright Act, 1911. To say that sect. 10, having regard to its language and to its position at the end of the five sections as to civil remedies, has no application to sect. 7, and that sect. 8 must have the strange effect that I have indicated, seems to me to involve a high degree of violence. I think that much less violence is involved if the last few words of the definition in sect. 35 are read as meaning : " Copies of a work in which copyright subsists, if imported in contravention of sect. 14, shall be deemed to be copies that infringe such copyright."

The result is that, in my view, if a claim were made, under sect. 7, for damages for conversion as to copies made abroad, but imported in contravention of sect. 14, the limitation of three years imposed by sect. 10 would apply even to that claim. One further point made in argument was the question : What, in such a case, can be the date of the infringement from which the three years are to run ? I do not see much difficulty in that. I think that the answer would clearly be the date of the arrival of the copies in the United Kingdom, and I also see that the same difficulty, if any, would arise if the question were asked with the substitution of "six years," the ordinary period of limitation, for "three years."

One other question, on the claim under sect. 7, was debated before Crossman, J.: What, in the circumstances of this case, must be taken to be the act of conversion? Under that section, the infringing copies are to be deemed to be the property of the owner of the copyright. A manuscript copy would become his property as it was written out. A printed copy would become his property directly it was printed. He is at once entitled to the possession of either. What, then, is the subsequent act by which he is deprived of the possession of it, so that he may claim damages for conversion in lieu of his claim for delivery up? I think it is a mistake to indulge in too much refinement as to this. Crossman, J., held that the act was sending the piratical sheets to the binders and ordering them to bind them. But the sheets would still be in the possession of the defendants or their agents, and, on a demand from the plaintiffs, could be delivered up to them. This might involve cutting the pirated matter from the unbound sheets, or cutting it from the bound volumes, a process which would be the same in kind, though the ease of accomplishing it might vary. In my view, the act which makes any delivery up impossible, and therefore the act which deprives the plaintiffs of the right of possession, is the sale of the volumes by the defendants. If this, the sale of the volumes by the defendants, be substituted for the sending of the sheets to the binders, accepted by Crossman, J., as the act or moment of conversion, I do not understand that it can make any practical difference in the estimate of the damages for conversion at which he arrived.

As to the defendants' cross-appeal, I arrive much more easily at the conclusion that it must fail. I think that an illustration may be useful. The 1911 Act, for the first time in our copyright legislation, made the right of an author in an unpublished work part of statutory copyright, and therefore part of his personal property. Suppose an author says in his will: "I leave to my nephew Michael my box marked 'A,' and the manuscripts contained in it, and the copyright in those manuscripts, and I leave to my nephew Morris my box marked 'B,' and the manscripts in it, and the copyright in those manuscripts." The only really valuable work he leaves behind him unpublished is a completed novel. He made his will under the belief that the whole manuscript of that was in Box "A," left to Michael. In fact, he is in error. Only the first half is in Michael's box, and the second half is in Morris's box. The author is not a Stevenson, and Michael's first half is not a Weir of Hermiston. The value of the manuscripts owned by each, and of the copyright owned by each, is quite small, say, £10. Morris comes to Michael and says, "I should like to read Uncle Joseph's novel all through. Will you lend me your half?" Michael lends it to him, to be read only, and returned. Morris copies Michael's half, adds it to his half, and sells the whole to a publisher for £1,000. When Michael sues Morris for conversion, obviously he ought to recover at least £500 damages. But, according to Mr. Henn Collins' argument, he ought to get only £10, the value of his copyright by itself, when it was appropriated.

This illustration also, I think, helps to show that, as I said above, damages for breach of copyright and damages for conversion are comple-A mentary, and that together they make up the totality of loss inflicted on the owner of the copyright. If the defendant copies the whole of the plaintiffs' work, and sells it at the same price in the same market, the damage under the one head would be practically the same as under the other, but of course the plaintiff cannot get it twice over. If the B defendant copies the whole, but in a more expensive form, sold at a higher price, then damages for infringement will be small, while damages for conversion will be large. In my hypothetical case of the nephews, the damages for infringement would be nominal, but those for conversion would be very high. Conversely, if the defendant reproduces the whole, C but in a cheaper form and at a cheaper price, damages for infringement will be high, but those for conversion low. If the defendant takes, not the whole, but only part, of the plaintiff's work, the question of damages under either head becomes more complicated, and, if he does so, and reproduces the part mixed up with other matter not taken from the D plaintiff, it is more complicated still. That is the case. I think that the judge applied the right principles, and I see no reason to suppose that he was not perfectly right in assessing £50 as damages for infringement, and, assuming that the three-year limit applies, £150 as damages for conversion. In the result, I think that both the appeal and the cross-E appeal should be dismissed.

Appeal allowed with costs. Cross-appeal dismissed with costs. Order for payment of £544 *in substitution of* £200.

Solicitors: *White & Leonard & Nicholls & Co.* (for the plaintiffs); *Oswald Hickson, Collier & Co.* (for the defendants).

F [*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

ROAST *v.* ROAST.

G [PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Boyd Merriman, P., and Bucknill, J.), **November 4, 1937.**]

Husband and Wife—Summons for maintenance on ground of desertion—Defence of adultery—Admissibility of wife's statement reflecting on paternity of child—Rule in Russell v. *Russell—Summons dismissed—Wife's costs—Summary Jurisdiction (Married Women) Act,* 1895 (*c.* 39), *s.* 6.

H

A wife had for some time before Aug., 1936, been living apart from her husband. About that time she returned to him, the date of such return being stated by the wife to be Aug. 28, and by the husband to be Sept. 18. A child was born on May 28, 1937. At some date in Apr., 1937, the wife told the husband that he would have to keep the child, whether it was his or not. Upon that, the husband left the wife, and it was contended that this was not a case of desertion. There was other evidence from which it might be inferred that the wife had been guilty of adultery. The magistrate expressly stated that he made no finding as to the paternity of the child, but that he was satisfied that the husband was justified in leaving:—

HELD: the statement made by the wife did not amount to a statement that the child could not be the husband's child, but to one that it might be someone else's child, and did not, therefore, have the effect of bastardising the child, and so did not infringe the rule in *Russell* v. *Russell* (1). The magistrate was right in accepting it, along with other evidence, as justifying the husband in leaving the wife. A

[**EDITORIAL NOTE.** By subsequent decisions the rule in *Russell* v. *Russell* (1) has been restricted to cases where the husband seeks to prove adultery merely by proving the birth of a child and tendering evidence that he could not have been the father. Such evidence inevitably tends to bastardise the child. In the present case, the evidence, assuming that the court believed it, amounted to no more than an admission of adultery by the wife. It is clear that BUCKNILL, J., thought some evidence had been admitted in this case which was inadmissible under the rule in *Russell* v. *Russell* (1), but it would seem that he agreed that, treating the statement of the wife as an admission, it was admissible evidence. B

AS TO THE RULE IN *Russell* v. *Russell* (1), see HALSBURY, Hailsham Edn., Vol. 2, pp. 562, 563, para. 772; and FOR CASES, see DIGEST, Supp., Bastardy, Nos. 70a-79a.] C

Cases referred to:

(1) *Russell* v. *Russell*, [1924] A.C. 687; Digest Supp.; 93 L.J.P. 97; 131 L.T. 482. D

(2) *Warren* v. *Warren*, [1925] P. 107; Digest Supp.; 94 L.J.P. 68; 133 L.T. 352.

(3) *Boston* v. *Boston* (1928), 138 L.T. 647; Digest Supp.

APPEAL by the wife from the refusal of the magistrate, sitting at Thames Police Court, on Aug. 16, 1937, to grant her a maintenance order on the ground of desertion. The husband's defence was that the wife had committed adultery, to prove which he relied, *inter alia*, upon an alleged statement to himself by the wife to the effect that he would have to keep the child that was coming, whether it was his or not. This statement the husband supported by evidence showing non-access, but on the facts it was physically possible for the husband to have begotten the child within a normal period of gestation. The magistrate accepted evidence of the above statement given by the husband, and found that he had reasonable cause for leaving his wife. He therefore dismissed the summons. E F

One of the wife's grounds of appeal was: G

> That the court was wrong in law in admitting, or alternatively should have disregarded, evidence by the said James Henry Roast of non-intercourse between the spouses after the marriage, tendered for the purpose of bastardising a child born in wedlock.

Acton Pile, for the appellant wife: The statement in question, implying, as it does, that the child is not the child of the husband, is inadmissible under the rule in *Russell* v. *Russell* (1), and therefore cannot be received as an admission of adultery. [Counsel referred to *Boston* v. *Boston* (3).] H

Stanley Rees for the respondent husband.

Sir Boyd Merriman, P.: This is an appeal from the metropolitan magistrate sitting at the Thames Police Court, and we were told that the substance of the appeal was that the magistrate had given his decision in conflict with the well-known rule in the case of *Russell* v. *Russell* (1) in the House of Lords.

The matter arose in this way. The wife, the complainant, was claiming maintenance from her husband on the ground of desertion. The fact that a state of non-cohabitation had been set up by the husband's actually leaving the matrimonial home on Aug. 3, 1937, was common ground. The issue was whether or not he had just cause for leaving. If he had, then there was no desertion, and the magistrate held that there was such cause. It is said that he arrived at that decision because, in defiance of the rule in *Russell* v. *Russell* (1), he accepted evidence as to the paternity of a child which had been born on May 28, 1937, and that because of that, and solely because of that, he had been induced to find that the wife had committed adultery, and that therefore the husband was entitled to leave. This necessitated our examining both the evidence which was given in the case and the magistrate's reasons.

It is admitted that the wife had been living apart from her husband for some time before Aug., 1936. It is admitted that about that time—and I use the word "about" advisedly—she returned to her husband. The controversy is as to whether she had returned by Aug. 28, or whether, at the latest, she had returned by Sept. 18. She says Aug. 28, he says Sept. 18. It will be observed, of course, that one is precisely nine months before the date of the birth, and the other is eight months and ten days, and it is common ground that, from whichever of these dates it was until Mar., 1937, the husband and wife slept together as man and wife. I start, therefore, by calling attention to the fact that it is impossible for anybody to say in a court of justice that the husband could not have been the father of this child. That seems to me to be a vital fact in considering whether the rule in *Russell* v. *Russell* (1) applies at all. I do not think that any man can be heard to say, having regard to what everybody knows is the normal fluctuation in the period of gestation, that he could not have been the father of a child born eight months and ten days after the time when he admits that he had intercourse with his wife.

So far, except for that discrepancy of date, the facts are uncontroversial. Now the controversy begins. First of all, the husband says that long before that reconciliation, if it was a reconciliation in any real sense of the word, long before the wife came back, she had been misconducting herself with at least one man, and that she had so admitted. Quite plainly, of course, anything of that nature was condoned *ipso facto* by his taking her back. At any rate, he swore that she had admitted misconduct to him. She swore, curiously enough—I do not wish to turn this against her in any way, because it is a little doubtful to what date the admission relates—that he knew that she was pregnant when he took her back. I am not using that against her at all, but only to show that there is a conflict of evidence, whatever date that refers to, between her and the husband, who swears, on the other hand, that he did not know until March, two months before the birth of the child, that she was pregnant at all, and there was nothing at all about this pregnancy to arouse his suspicion. She made a remark to him in April, about which I shall have to say more in a moment, and the moment the remark was made he left her bedroom, and never slept with her again, because he became suspicious. For that reason, I say in passing, to show that the point has not been overlooked, I think we are absolved from considering any issue of condonation, not merely because it was not raised in the court below, but because the reason why it was not raised was probably because of that piece of evidence.

The child, as I have said, was born on May 28. At some date in April, according to the husband's evidence, the wife said to him—and the evidence was given twice—" I would have to keep the child whether it was mine, or not." He added : " I then became suspicious and left her room." He is cross-examined and repeats : " She told me I would have to keep the child whether it was mine or not." She, of course, denied, not in terms, that she had ever said that, because she gave evidence first, and that particular phrase was not used till the husband gave his evidence, but she had denied absolutely, categorically and definitely that she had ever committed adultery with anybody, or that she had ever made any sort of admission that she had committed adultery. So that in the main, at any rate, if not in detail, there was a clear conflict between her and her husband, though I agree with what was said in the course of the argument, that it is unfortunate, as things have turned out, having regard to the importance which must be attached to that phrase, that she was never specifically asked about whether she had used it, or about the precise words which she had used. However, there is a conflict between the husband and wife on the vital issue as to whether she had ever said anything at any time admitting adultery, and a still more vital conflict between them as to whether she ever had committed adultery, which she had denied. However, that is not the end of the conflict between the husband and the wife. The husband said that, on an occasion after she had returned—about three months after she had returned, which would be, of course, somewhere at the latter end of 1936 —her handbag had fallen to the ground, and out of it had come this piece of paper. I do not propose to read what is on this piece of paper. Suffice it to say that it is a string of verse of a singularly lewd character, every line beginning with the letters of the alphabet in sequence, and every one referring expressly or impliedly to some detail in the act of sexual intercourse. It is a perfectly filthy poem, and it is not necessary to quote anything from it. The husband said :

> That is in my wife's handwriting and it fell out of her bag three months after she came back to me.

The wife said :

> It is not in my writing at all, I have never seen it, I know nothing about it, I did once see a print of some verse like that, they were shown to me by some barmaids, but I know nothing whatever about this copy here. It is not in my writing.

It is now admitted to be her writing. The magistrate on ample material —because we have seen specimens of her handwriting, which he made her write out—came to the conclusion—quite rightly, as it now turns out—that she was lying about that, and that this filthy thing was written out by her, wherever she got it. Mr. Acton Pile now seeks to tell us (it received the attention which after-thoughts of that kind do receive on appeal when the witness herself has given her version of the paper) that, in fact, she copied it out at the husband's dictation. All I can say is that, if that is the explanation, it is singularly unfortunate that she did not give it when she had the opportunity to give evidence to the magistrate, and it is not on statements of that sort that one can decide appeals.

So much for evidence, one way and the other, which, in my opinion, was unquestionably relevant, but there is a piece of evidence which, in my opinion, ought not to have been admitted, though, for reasons which I will give, I am doubtful whether it really infringes the rule in the *Russell* case (1). I will read now the whole passage from the evidence upon which the case really turns. The husband says :

> In March I did know of her condition, it was apparent then. I slept with her and had connection with her up till April, I did not then know about it.

Then there is a blank. It may be that some word is missed out. At any rate, it is accepted by everybody as quite obvious that what he is referring to is : " I did not then know about her having had connection with anybody who might be the father," or words to that effect. Whatever the actual words, it disposes, as I have already said, of the question of condonation. Then he goes on :

> If it was my child it would not have been born till June. She can be very brazen at times. She told me I would have to keep the child, whether it was mine or not.

It is quite plain, since the decision in *Russell* v. *Russell* (1), that a husband cannot prove the adultery of his wife at a time, at any rate, when they were nominally living together, or, to put it the other way, when they were not living apart, either under a formal agreement or an order of the court, by saying that, at the time of possible conception, he did not, in fact, have sexual intercourse with his wife, and, of course, in this sentence he is trying to say that. He is in effect saying : " I say that I did not have sexual intercourse with my wife, when I took her back, till Sept. 18, and therefore a child born on May 28 cannot have been conceived as a result of intercourse with me." So far, I am quite satisfied that that question, even if it was not strictly inadmissible, ought not to have been given in evidence, because he, at any rate, was trying to say, whether he could in law say it or not : " I did not have access at the material date." I wish to add that I doubt whether any court could

possibly, assuming it believed that evidence literally and absolutely, be asked, upon that, to find that adultery was proved by the birth of the child, seeing that, on his own admission, the date before the date of the birth when he admits he had connection with his wife was as long as eight months and ten days. In other words, the evidence, though undoubtedly given for the purpose of proving that he could not have A
been the father, so manifestly fails on the face of it to effect that purpose that it seems to me really to be unnecessary further to consider its bearing. The magistrate has said definitely and absolutely in his reasons that he makes no finding as to the question of paternity. I had better read the whole of his reasons : B

> The defendant has left his wife and will not go back. His reason is that she has been unfaithful. A good deal turns on the question whether it is his child or not. I make no finding as to its paternity, but I am satisfied that the defendant, on the whole, has told me the truth, and that his wife has not. The defendant says she made an admission about the child and it is significant that it is the wife who is the suppliant last Aug. or Sept. No doubt the defendant has a past too. I have C
> no doubt in my own mind of any sort that the wife wrote out that document, and the defendant, who ought to know, says it is her writing. I am satisfied defendant was justified in leaving her.

I agree that it is possible to direct criticism to the wording of those reasons. I agree that the phrase " A good deal turns on the question whether it is his child or not " is a phrase which raises the sort of diffi- D
culties of which Mr. Acton Pile has made full play, but that, in my opinion, must be taken with the next sentence. The magistrate said that he is making no finding as to paternity. In my opinion it is vital to appreciate where this case differs from a case in which it could be said that the rule in *Russell* v. *Russell* (1) was infringed. When a husband E
comes to court and seeks to prove adultery merely by saying that a child has been born and by tendering evidence that he could not have been the father, one has the *Russell* v. *Russell* case (1). If he tries to say that himself, though he was living in Singapore at the time, we are obliged, by *Russell* v. *Russell* (1), to say that he cannot be heard to say F
it. But somebody comes from the Admiralty or the War Office, or wherever it may be, to say that he was in Singapore at that time, and the case is decided then upon the evidence of the officer who is sent by the Admiralty for that purpose. That is a case which depends solely and entirely upon evidence of adultery with any man, not upon evidence G
of any admission by the wife of adultery with any man, not upon evidence of association, or anything of that sort, but on the simple facts that a child is born on a certain date and that the husband could not have been the father, because it was not possible that he could have had sexual intercourse with his wife at any relevant date. That is not this H
case. I have already said that evidence, even if believed—even if it were admissible and believed—that this man did not have sexual intercourse with his wife before Sept. 18, leads him nowhere. It does not begin to make a case of that sort. It is one thing to say that there is evidence that the child cannot be the child of the husband, but it is

quite another thing to say that there is evidence that it may be somebody else's child. In my opinion, this case is a case of the latter class. The evidence which, upon a conflict of evidence, the magistrate believed, was evidence that the wife had expressed a doubt as to whether the husband was the father. That does not bastardise the child, it does not infringe the rule in *Russell* v. *Russell* (1), but it shows that, in her own mind, she knew that there were, and said that there were, two or more people one of whom might be the father, one of whom was the husband, and, having regard to the laws of nature, in my opinion that is an admission that some other man had had sexual intercourse with her at a material time. In my opinion, therefore, this case comes down to the simple question—nothing whatever to do with *Russell* v. *Russell* (1)—as to whether the phrase the wife used could be construed by the magistrate as an admission of adultery. I wish to say, in passing, that a great deal of guidance is to be drawn from the decision of the late Swift, J., in *Warren* v. *Warren* (2). He was sitting at that time as an additional judge of this division, and he gave a decision which has been, and is, consistently followed every day in these courts. I will read the headnote:

> A wife's admission that she had committed adultery, even if accompanied by a statement of her belief that a child, subsequently born, was the result of the adultery, cannot bastardise the child without evidence of the non-access of the husband. The confession of the wife, therefore, that she has committed adultery is admissible as evidence in a suit for divorce so long as she does not assert that the husband could have had no access at the time of conception.

In this case, both parties were asserting, at least the wife was certainly asserting, that the husband could, and did, have access to her at the time of conception. The husband was asserting that he could and did have access to her at a time, not indeed which she said was the time of the conception, but at a time less than three weeks later than that. Neither of them could possibly have been heard to say that that evidence bastardised this child, and, therefore, if the wife had said in terms: "I committed adultery, but I do not know whose the child is," Mr. Acton Pile does not dispute that this court could and ought to listen to the admission, "I committed adultery," while rejecting anything which could cast reflection, if it could cast reflection, on the paternity of the child. It all, therefore, comes down to this, and to nothing else but this: Was the phrase about which the magistrate says he believes the husband's evidence sufficient to constitute an admission of adultery? I do not know myself what could be stronger. Quite plainly it does not matter. The question cannot turn upon whether the wife says expressly: "I have committed adultery," or whether that is a necessary inference from what she does say. To my mind, a woman who comes to court and says: "I have never committed adultery with any man, never had sexual intercourse with anybody except my husband," but is believed to have said, on the other hand: "You will have to keep this child whether he is yours or not," is, in my opinion, saying something which suggests, in the plainest possible terms, that she had had intercourse with some man other than her husband. In my opinion, on this conflict of evidence here, not, indeed, a conflict as to whether she actually used those words, but as to whether she had ever in any form admitted adultery, whether she was shown by this filthy verse to be a woman, not of adulterous habits—that is not the point—but of lewd mind—having regard to all A those points about which there was a conflict of evidence, the magistrate was entitled to make up his mind as to where the truth lay. In my opinion, as soon as he decided that the husband was to be believed, and the wife herself had thrown doubts on the question about the paternity of this child, he was entitled to say that that is an admission by her B that she had committed adultery. He was entitled to say, because this was not disputed, that the husband first had that brought home to him at a time when she was just about to give birth to the child, that he never condoned that when once he had become convinced that that was what she meant, and that there was, therefore, no statutory bar to giving to C the husband relief, to which he was entitled, from any claim by the wife that he had deserted her without just cause. I think, in conclusion, that, if what the magistrate said is viewed in the light of those considerations, it will be seen that that is—shortly, and perhaps not altogether happily, expressed—what he meant: D

> His reason for leaving her is that she has been unfaithful. A good deal turns on the question whether it is his child or not. I make no finding as to its paternity . . .

Supposing one reads that, as I think the context demands one should read it: "A good deal turns on whether she raised the question whether it is his child or not, but I make no finding as to paternity," the whole E thing is quite simple. That, in my opinion, is the real underlying reason for the magistrate's decision. In my opinion, this appeal should be dismissed.

BUCKNILL, J.: I agree. At the same time, I think it my duty to F say that the case does present some considerable difficulties. One has first of all, however, to bear in mind what is the real issue in the case. The real issue in the case is not whether or not the wife had committed adultery, but whether the husband had reasonable cause to leave the wife, and on that issue there is a specific finding by the magistrate that G the husband was justified in leaving her, and he came to that decision after seeing witnesses and accepting the evidence of the husband and rejecting the evidence of the wife. His opinion on that matter is abundantly confirmed by what we have heard to-day as to the real authorship of the filthy document that has been put in. However, to my mind, the H difficulty in the case arises because a good deal of evidence was given by the husband tending to show that he could not be the father of the child. That evidence, to my mind, was inadmissible, because it was evidence of the non-intercourse, or non-access of the husband, which may possibly have the effect of bastardising the child of a married woman.

I quote that from the judgment of SWIFT, J., to which SIR BOYD MERRIMAN, P., has referred. That evidence was tendered. It was not objected to, and it was accepted by the magistrate, and it is extremely difficult for any court reviewing his judgment to know what value, if any, he attached to it. Quite apart from that evidence, however, it
A seems to me that there was abundant material for the magistrate to come to the decision at which he has arrived, that the defendant was justified in leaving his wife. There is, first of all, the admission by the wife, to which SIR BOYD MERRIMAN, P., has referred, an admission which, if it was made, can mean only that in the mind of the wife there was
B a doubt as to whether some other man was the father of her child. It is, however, unfortunate that that admission was not put to the wife, and, speaking for myself, I do not think that too much importance should be attached to remarks made by the wife to the husband, or to those made by the husband to the wife. That, however, is a matter for the
C magistrate, who saw the witnesses, to consider. It is not for a court reviewing the decision to attach weight to evidence. The magistrate accepted the evidence of the husband. He says in terms that the defendant said that she made an admission about the child, and he says that he is satisfied that the defendant has told him the truth. She, also,
D by her conduct, in the mind of the magistrate, acted in a significant way. She wanted to come back to her husband about the time when the conception started, and, if an admission by the wife is admissible against her, I think that conduct tending to show the same result is also equally admissible. Then, apart from that, there is the evidence
E of the recent visit to the ship. Weight has to be attached to that. I can hardly believe that " quite recent " means a visit which took place a year before. Then there is this filthy paper, admittedly in her writing, found in her bag after she had come back to him.

In my view, taking the whole of the evidence which is admissible, the
F magistrate was justified in coming to the conclusion that the defendant had grounds, and reasonable grounds, for leaving her, and that there are no proper grounds for our differing from his judgment.

Appeal dismissed. Appellant had not obtained security for her costs of appeal, but the court stated that it would assume that there had been an order
G *for £10 10s. security, and the wife would be allowed costs not to exceed that sum.*

Solicitors: *Edward Fail* (for the appellant); *C. V. Young & Cowper* (for the respondent).

Reported by J. F. COMPTON MILLER, ESQ., *Barrister-at-Law.*]

H

CONSOLIDATED ENTERTAINMENTS, LTD. *v.* TAYLOR.

[KING'S BENCH DIVISION (Lewis, J.), **November 16, 17, 19, 1937.**]

Companies—Receiver and manager—Appointed by the court—Liability—Rent—Whether personally liable.

The defendant was in Nov., 1934, appointed receiver and manager of a company, which was the lessee of a cinema. As such receiver he paid the rent for the December quarter. On Jan. 15, 1935, he was appointed receiver and manager of the company by the court. He was sued as such receiver for the quarter's rent of the premises due in June, 1935, it being contended that, as he was appointed by the court, he was not the agent of the debenture holders but was personally liable for the rent:—

HELD: although the receiver was appointed by the court, he would not be liable on a contract which he had not made himself, and was therefore not liable for the rent sued for.

[**EDITORIAL NOTE.** A receiver appointed by the court is in a different position to one appointed out of court. He is not the agent of anyone, and if he enters into a contract, he is personally liable thereon; but this is not so in the case of the rent of the premises in which the business of the company is carried on. He is not a party to, nor is he an assignee of, that contract.

AS TO LIABILITY OF RECEIVER APPOINTED BY THE COURT, see HALSBURY, Hailsham Edn., Vol. 5, pp. 524, 525, para. 852; and FOR CASES, see DIGEST, Vol. 10, pp. 797, 798, Nos. 5037-5041.]

Cases referred to:

(1) *Owen & Co.* v. *Cronk*, [1895] 1 Q.B. 265; 10 Digest 792, *4974*; 64 L.J.Q.B. 288.

(2) *Burt, Boulton & Hayward* v. *Bull*, [1895] 1 Q.B. 276; 10 Digest 803, *5091*; 64 L.J.Q.B. 232; 71 L.T. 810.

(3) *Hand* v. *Blow*, [1901] 2 Ch. 721; 10 Digest 797, *5037*; 70 L.J.Ch. 687; 85 L.T. 156.

(4) *Justice* v. *James* (1899), 15 T.L.R. 181; 31 Digest 270, *4147*; *on appeal from* 14 T.L.R. 385.

(5) *Scott* v. *Ebury (Lord)* (1867), L.R. 2 C.P. 255; 10 Digest 1173, *8325*; 36 L.J.C.P. 161; 15 L.T. 506.

(6) *Pilbrow* v. *Pilbrow's Atmospheric Ry. Co.* (1846), 3 C.B. 730; 9 Digest 675, *4502*; 16 L.J.C.P. 11; 8 L.T.O.S. 163.

ACTION against a receiver and manager appointed by the court for rent accrued due in respect of the company's premises during his receivership.

A. S. Comyns Carr, K.C., and *H. J. Astell Burt* for the plaintiffs.

R. F. Roxburgh, K.C., and *M. J. L. Beebee* for the defendant.

LEWIS, J.: The action before me is one for the sum of £691, which is made up of rent from June 24, 1935, until Feb. 19, 1936, of certain premises known as the Norbury Cinema and Dance Hall. The sum, as I say, is made up of rent, and a small amount of it consists of insurance premiums. The Norbury Properties, Ltd., were the lessees of the Norbury Cinema and Dance Hall under a lease granted by the plaintiffs to them for 21 years on Jan. 24, 1934, at the rent of £1,000 a year payable quarterly in advance. Apparently, the venture of the Norbury Properties, Ltd., was not altogether successful, and in November, or at the beginning of December, 1934, the defendant Taylor was appointed—not by the court, but he was appointed—as receiver for certain of the debenture holders, and as such receiver he in fact paid in Dec., 1934, the quarter's rent which was due on that date. On Jan. 15, 1935, he was appointed receiver and manager by order of the court. He was in possession of the cinema as receiver and manager. This cinema was the only asset of the company, and in fact Taylor remained in possession of the cinema until Feb. 19, 1936. The first rent that became due after the appointment of Taylor as receiver and manager was the rent due in Mar., 1935.

After Taylor had been appointed receiver and manager on behalf of the debenture holders by the court, he proceeded at once to endeavour to assign the lease, and in fact on Feb. 1, 1935, it appears, from a letter of that date in the correspondence, that he was seeking a licence to assign the premises to a purchaser. Unfortunately, in spite of the negotiations, owing to reasons into which I need not enter, Mr. Taylor failed to get a purchaser for the lease. Meanwhile, as I have said, the rent was due in Mar., 1935, and there is no question that there was a difficulty with regard to that rent being paid. On pressure by the plaintiffs, however, an arrangement was made that Mr. Taylor should, by a cheque on Apr. 15, pay £150, and give his personal undertaking to pay the balance of £100 within a month. That arrangement or agreement is set out in the letter from Mr. Fenton, the secretary of the plaintiffs, in which he says:

> Regarding the rent due on the 25th ultimo if it will assist you personally I am instructed to agree without prejudice in all respects to the payment of £150 forthwith and the balance of £100 by the 30th instant subject to your personal undertaking in regard to the £100 balance.

That was agreed by Mr. Taylor, and in fact he drew a cheque. That cheque was dishonoured, and was dishonoured more than once, and Mr. Taylor failed to pay the balance of £100, with the result that, on Sept. 22, 1936, an action was brought by the company against the present defendant, Taylor. In that action, the statement of claim was as follows:

> The plaintiffs' claim is against the defendant as drawer of a cheque for £150 which was dishonoured of which on presentation the defendant had notice and for the sum of £100 balance of one quarter's rent of the Norbury Cinema and Dance Hall, Norbury, agreed to be paid by the defendant to the plaintiffs as evidenced by certain letters.

One of those letters is the letter to which I have already referred.

The cause of action to be seen there was on a dishonoured cheque and on a personal undertaking for the balance of £100 owing by the defendant to the plaintiffs. That action was brought before the late SWIFT, J., and it was tried on Oct. 21, 1936. In the action, when the case came on for trial, it apparently had been suggested, or pleaded, that Mr. Taylor was not personally liable for this money, but it is pointed out in the judgment of Swift, J., a copy of which has been supplied to me, that: "The defence started by saying that Mr. Taylor was not personally liable. That defence was promptly abandoned by Mr. Gardiner," who appeared for the defendant. So that, in that case, the question of the personal liability of Mr. Taylor did not arise, and now, with the greatest respect to counsel, it would seem to me impossible, by the agreement contained in the document, to say that Mr. Taylor had not made himself personally liable for at least £100 balance of that quarter's rent. Therefore, the question which is before me now is an entirely different question, in my view, from the question which Swift, J., decided in that action.

In that action, the company recovered judgment for the amount claimed. It is not without interest to note that the writ in that action was issued on Sept. 22, 1936, and that, by that date, there was due not only the sum amounting to a quarter's rent, £250, which sum was due in March, but also the whole of the rent and the moneys which are sued for in this action. If the plaintiffs are right in this action, one asks oneself why, if their contention is right, did they make two bites at a cherry, and not bring the action for the whole of the amount then due, instead of dividing it into two, and not suing for the balance of their rent until Feb. 8, 1937? Mr. Fenton, who gave evidence for the plaintiffs, told me, perfectly truly, that that was done upon the advice of their solicitors. Of course, the fact that they did not sue for it by their writ of Sept. 22, 1936, does not necessarily mean that they are not entitled to sue for it now, but one cannot help feeling that they should have sued for the whole amount in Sept., 1936, instead of issuing a second writ for the amount which they now claim.

The claim they are now making is this. By their statement of claim, they seek to establish that an agreement was made by Taylor, the defendant, who was the receiver and manager, that he would render himself personally liable for this rent, it being alleged that there was an agreement to that effect which was partly oral and partly in writing. So far as concerns the interviews at which took place the conversations, which they say form part of the agreement, Mr. Fenton is called, and he had been asked for particulars, and he had said, no doubt perfectly accurately, that the interviews took place between Apr. 10 and May 20, 1935. When he went into the witness-box, he deposed to there having been three interviews, one on Apr. 10, another on Apr. 24, and the other on May 20. Put quite shortly, what happened at those interviews was that on Apr. 10 pressure was being made by the company for the rent due in Mar., 1935, and Mr. Taylor said that he was doing his best, indicating to Mr. Fenton that he was proposing, as is the fact, to assign the lease. On Apr. 24, the conversation, according to Mr. Fenton, was very much the same. Mr. Taylor said that unfortunately there had been a hitch with regard to the assignment of the lease, and that he was trying to make the best of the arrangement, so that the rent should be paid. On May 20, much the same was said, but the importance of the evidence of Mr. Fenton with regard to that interview is that in none of those interviews was it ever suggested, and nothing was ever said to the effect, that the rent would be payable in the future. Of course, by May 20, there would have been no rent due except the rent due in March. The next rent would have been due in June, but Mr. Fenton quite frankly and perfectly honestly said that at those interviews they were discussing only the rent which was then due, namely, the rent due in Mar., 1935.

I have been careful to look through all the letters which are pleaded as forming part of the alleged agreement that Mr. Taylor should be personally liable for this rent, and I may say, I hope, that, although I have given proper attention to the argument of Mr. Comyns Carr and of Mr. Astell Burt, who appeared for the plaintiffs, I am unable to find in the correspondence anything which may be taken, or ought to be taken, as an agreement with Mr. Taylor to be personally liable for any quarter's rent other than the one which was due in Mar., 1935. Of course, it has been said, and has been quite rightly said, that Mr. Taylor, the receiver and manager of these debenture holders, was apparently a young man, and I think it was suggested, certainly it was referred to in the judgment of SWIFT, J., that it was his first appointment as receiver and manager. Of course, it may be said that he was anxious only to hang on as long as possible in order to get leave, which the court would grant him, and of course to enable him to make a success of this, the first time, as I understand it, that he had ever been appointed as receiver and manager. There is nothing that I have heard, and nothing in the correspondence that I have seen, however, to suggest that Mr. Taylor was doing anything other than acting perfectly properly for the interests of his debenture holders. He was trying perfectly honestly in the best interests of the debenture holders to sell this place as a going concern.

It is equally obvious that the plaintiffs were desirous that, if possible, Mr. Taylor should get a purchaser, somebody of substance, to whom the lease could be assigned without any trouble to himself, so that they would make sure of the rent, instead of what would have happened if Mr. Taylor had immediately gone out and had done nothing at all, leaving the company with no assets out of which to recover their rent.

Those being the facts as I find them, Mr. Comyns Carr and Mr. Astell Burt at the outset maintain an argument that, as Taylor was receiver and manager appointed by the court, he had no principal, and that, therefore, he was liable, and, further, that he was not in the same position as an ordinary receiver and manager, not appointed by the court, and that there was at least a presumption that he was making himself personally liable for the rent—I think Mr. Comyns Carr went as far as this—unless he expressly stipulated that he was not so personally liable, and that, therefore, that being the presumption, the plaintiffs were entitled to recover from him. In support of that contention, Mr.

Comyns Carr cited to me *Owen & Co.* v. *Cronk* (1) and *Burt, Boulton & Hayward* v. *Bull* (2), in illustration of the argument that he was putting before me. In *Owen & Co.* v. *Cronk* (1), it was held that, when there was a receiver appointed by the trustees under a deed, and not by the court, when he incurred expenses, he was incurring them on behalf of the trustees, and not on his own account personally. The next case, *Burt, Boulton & Hayward* v. *Bull* (2), was a case in which the position of a receiver and manager appointed by the court was considered. It is perfectly true that in that case there were remarks made by LORD ESHER, M.R., and by other judges in the Court of Appeal to the effect that, in that case, the receiver and manager had made himself personally liable, and was personally liable, for the debts which he had incurred by contracts made by him for the purpose of carrying on the business. Now, at first sight, it seemed a little difficult to distinguish, on the principle, why the receiver and manager should be liable for contracts made by him for the purpose of carrying on the business, if he was not also liable, on the same principle, to pay rent of the premises, which was, so to speak, a going concern; but Mr. Roxburgh has satisfied me that there is not only a distinction between those two cases but also direct authority for saying that, in a case like the present one, when the rent is being paid, there is no personal liability upon a receiver and manager appointed by the court, because he has not made the contract.

Mr. Roxburgh first of all referred to *Hand* v. *Blow* (3), and also to *Justice* v. *James* (4). Suffice it to say that I think that, in that case, *Burt, Boulton & Hayward* v. *Bull* (2) was distinguished, and the court said that, in the circumstances, where the receiver and manager was appointed by order of the court, he was not responsible personally for the rent of the premises. I read one passage out of the judgment of RIDLEY, J. He says, at p. 385:

> This case was not governed by *Burt, Boulton & Hayward* v. *Bull* (2). There the receiver and manager had entered into a contract; here he had not; he had only, in reply to a demand, paid rent due from the company.

In my view, that governs this case, and, as I have said, I am satisfied that the contention of Mr. Comyns Carr—namely, that there is a presumption that the receiver is personally liable in a case of this sort—is not the correct view, and that there is nothing in the correspondence which indicates, to my mind, that the plaintiffs were looking to Taylor personally, or that Taylor ever was pledging his own credit, with regard to the sums sued for in this action.

One other matter which I must deal with arises out of the argument which has been submitted to me. In the course of the correspondence and the negotiations, undoubtedly there was an arrangement made between the parties that the rent should be paid out of the profits of sale of the lease. Mr. Fenton was careful to tell me, and I accept it, that it was never said: "We will only look to the proceeds of sale for our rent." It was never suggested—and, indeed, he was emphatically saying, and the way he expressed it was that it was never made a condition, that is to say, it was never said and it was never suggested—that the fund should be the only source from which the rent was to come.

The defendants in this action pleaded in para. 3 of their defence :

> The true facts are that after Mar. 25, 1935, the plaintiffs refrained from enforcing their right of re-entry or other rights under the said lease against the cinema company in the hope and expectation that the defendant would be able to effect a sale of the company's leasehold interest and to pay to the plaintiffs upon completion out of the proceeds of sale all arrears of rent due from the cinema company.

If that was intended to mean that the plaintiffs had agreed that they would look only to a fund, which somebody at this time was going to bring into existence, and that only that fund was to be liable for this rent, I respectfully think that that plea, in the circumstances of this case, was wrong both in law and in fact.

Mr. Astell Burt referred me to two cases in support of the proposition that, when a person allocates a fund, and says, " I will pay you out of a certain fund," he being liable before he makes that arrangement, if that fund does not come into existence at all, or if it is insufficient to meet the debt, the person making that arrangement, the original debtor, is still liable. He does not get rid of his liability by saying in a case of this sort : " I will pay you out of a certain fund." The first of the two cases to which I was referred was *Scott* v. *Ebury* (*Lord*) (5), where the proposition to which I have referred was, I think, laid down, but it is important to observe that, in that case, there were two questions argued. The first question was whether originally there was any liability in Lord Ebury and his other co-defendants, who were the promoters of the railway company. The question which was first argued was : " Were the promoters liable or was the company liable ? " The court held that the promoters were liable. That is to say, quite apart from the arrangement to pay out of a particular fund, the original debtors were the promoters. Then again, the question was argued afterwards, and it was suggested that the company promoters had agreed to pay out of a particular fund and that they thereby got rid of a particular liability, but the court said : " No, they have not got rid of their liability." The other case to which I was referred was *Pilbrow* v. *Pilbrow's Atmospheric Ry. Co.* (6). There, the second of the two points to which I have referred in *Scott* v. *Ebury* (*Lord*) (5) was argued. The first point was not argued, because it was admitted, and the question never arose, because the company, Pilbrow's Atmospheric Ry. Co., was liable.

Now, it seems to me that those two cases do not help in this particular case, because I am not satisfied, for the reasons that I have given, that there ever was any personal liability in Mr. Taylor, and, if there was an arrangement made that the plaintiff's rent should be paid out of a certain fund, the fact that that fund fails from any cause cannot create a liability in Mr. Taylor which never existed before. If I was satisfied that Mr. Taylor had agreed to pay the rent personally, undertaking personal liability for the payment of the rent, then I agree that the fact that he had made an arrangement that the rent should be paid out of the fund would not, on the failure of that fund, release him from his liability. However, in view of the fact that I find that he has never pledged his credit at all, and has never entered into any contract personally to pay it, my judgment must be for the defendant with costs, and I do not want to repeat what I have A already said before I started to give judgment, namely, that this judgment is without prejudice to any step which the plaintiffs may be advised to take in other proceedings.

Solicitors: *J. R. Cort Bathurst* (for the plaintiffs); *C. R. Enever & Co.* (for the defendant). B

[*Reported by* W. J. Alderman, Esq., *Barrister-at-Law.*]

Re CONLEY (TRADING AS CAPLAN AND CONLEY), *Ex parte* THE TRUSTEE *v.* BARCLAYS BANK, LTD. *Re* CONLEY (TRADING AS CAPLAN AND CONLEY), *Ex parte* THE TRUSTEE *v.* LLOYDS BANK, LTD. C

[Chancery Division (Farwell, J.), **November 16, 17, 18, 22, 1937.**]

Bankruptcy—Fraudulent preference—Bank overdrafts secured by mere deposit of documents of third party without any agreement to pay sums owing—Account put into credit and documents released immediately before bankruptcy—Absence of contractual relationship between depositor and creditor—Surety or guarantor—Bankruptcy Act, 1914 (c. 59), s. 44. D

In Apr., 1931, and again in May, 1933, the wife of the bankrupt deposited with a bank War Loan as collateral security for the bankrupt's indebtedness to the bank. In Feb., 1933, the bankrupt's mother deposited certain War Loan and Building Society shares for the same E purpose. Similar arrangements were subsequently made with Lloyds Bank. Shortly before Nov. 16, 1934, by various means the bankrupt paid large sums into his accounts so that on that day the accounts were in credit. Shortly after that date, the wife and mother demanded the release of the securities and obtained them. On Nov. 30 the business of the bankrupt was closed down and he was immediately made bankrupt. F The securities in question were merely deposited with the bank, and neither the wife nor the mother gave any covenant or undertaking of any kind to pay any sum to the bank:—

Held: (i) as the depositors did not enter into any contract to pay the bank, neither was a "surety or guarantor" within the meaning of the Bankruptcy Act, 1914, s. 44, and there was, therefore, no fraudulent preference. G

(ii) this was not a case for an order under R.S.C., Ord. 50, r. 3, for the preservation of the securities in the hands of the respondent or for payment of a sum of money into court.

[**EDITORIAL NOTE.** The statutory enactment was altered in 1913 to extend fraudulent preference to a payment to a creditor to prefer a surety or guarantor. In the present case the question is whether a person can be surety or guarantor if H he has not entered into any contract to pay the debt or some part thereof to the creditor. Here there was a bare deposit of securities, and the only remedy open to the creditor was to realise the securities by sale. There was no covenant or agreement on the part of the alleged surety to pay part of or the whole of the debt, and in these circumstances it has been held that such a person is not a "surety or guarantor" within the Bankruptcy Act, 1914, s. 44.

As to Guarantors and Fraudulent Preference, see HALSBURY, Hailsham Edn., Vol. 2, pp. 368, 369, para. 498; and for Cases, see DIGEST, Vol. 5, pp. 855-857, Nos. 7174-7185.]

Cases referred to:

(1) *Re Mills, Ex p. Official Receiver* (1888), 58 L.T. 871; 5 Digest 893, *7359.*

(2) *Re Warren, Ex p. Trustee,* [1900] 2 Q.B. 138; 5 Digest 893, *7360*; 82 L.T. 502.

(3) *Re Lyons, Ex p. Barclays Bank, Ltd.* v. *Trustee* (1934), 152 L.T. 201; Digest Supp.

(4) *Re Stanley (G.) & Co.*, [1925] Ch. 148; Digest Supp.; 94 L.J.Ch. 187; 133 L.T. 37.

(5) *Peat (Sir William Henry)* v. *Gresham Trust, Ltd.*, [1934] A.C. 252; Digest Supp.; 151 L.T. 63; *sub nom. Re M.I.G. Trust, Ltd.*, 103 L.J. Ch. 173.

(6) *Wanklyn* v. *Wilson* (1887), 35 Ch.D. 180; 36 Digest 476, *1403*; 56 L.J.Ch. 209; 56 L.T. 52.

Motions by the trustees of the property of Morris Conley, a bankrupt, for (i) a declaration that sundry payments amounting to £2,633 9*s*., made by the bankrupt to the respondent bank between Oct. 1, 1934, and Nov. 30, 1934, by way of reduction of the bankrupt's overdraft at the respondent bank were payments by way of fraudulent preference of the respondent bank and/or of the respondent Mrs. Cohen a guarantor of the said overdraft, and were and are void as against the applicants by virtue of the Bankruptcy Act, 1914, s. 44 (1); (ii) a declaration that the moneys so paid amounting to £2,633 9*s*. as aforesaid form part of the bankrupt's estate; (iii) a declaration that sundry further payments amounting to £950 made by the bankrupt to the respondent bank between Oct. 1, 1934, and Nov. 30, 1934, by way of reduction of the respondent's overdraft at the respondent bank, were payments by way of fraudulent preference of the respondent bank and/or of the respondent Hannah Conley, a guarantor of the said overdraft, and were and are void as against the applicants by virtue of the Bankruptcy Act, 1914, s. 44 (1); (iv) a declaration that the moneys so paid, amounting to £950 as aforesaid, form part of the bankrupt's estate; and (v) an order (*a*) that the respondent bank do repay the sum of £3,900 13*s*. or, alternatively, the sum of £2,633 9*s*. and/or the sum of £950 to the applicants or as they shall direct; or alternatively (*b*) that the respondent bank and the respondent Mrs. Cohen do repay the sum of £2,633 9*s*., and/or that the respondent bank and the respondent Hannah Conley do repay the sum of £950 to the applicants or as they shall direct; or, in the further alternative, (*c*) that the respondent Mrs. Cohen do repay the sum of £2,633 9*s*. and/or that the respondent Hannah Conley do repay the sum of £950 to the applicants or as they shall direct.

Roger S. Bacon and *David Renton* for the trustees.

Fergus D. Morton, K.C., and *John Buckley* for Barclays Bank, Ltd.

W. N. Stable, K.C., and *J. B. Blagden* for Lloyds Bank, Ltd.

H. Aronson for Mrs. Bessie Cohen.

H. C. Leon for Mrs. Hannah Conley.

FARWELL, J.: For the purposes of this judgment, these two motions can be taken together. Although the facts in the two cases are not precisely the same, the question which I now have to consider in both cases is identical. Both motions are by the trustees in bankruptcy of one Morris Conley, and in both motions they seek to establish that certain payments made, in one case to Barclays Bank and in the other to Lloyds Bank, were undue preferences, and to recover certain sums of money paid by the bankrupt to the banks respectively.

The course adopted at my instigation at the hearing of these motions was somewhat unusual, but was adopted solely with a view to avoiding costs, which would necessarily be heavy, and might, in certain circumstances, be needlessly incurred; and since, in this case, from the point of view, at any rate, of the creditors, costs were a serious consideration, it seemed right to me to take the course which I did, which was as follows. Counsel on behalf of the applicants on both motions opened the facts to me in considerable detail, and with much ability, and informed me that it would be necessary for him to call a large number of witnesses. At the close of his opening, I invited him to satisfy me, if he could, that, assuming that all the statements made in opening could be proved, he was entitled to any relief, and the whole argument proceeded upon that footing; and, since, in the view which I take of this matter, the applicants cannot succeed in any event, the cost of taking the evidence has been avoided.

In those circumstances, I propose to state, as shortly as possible, only those facts or assumptions which are necessary to make the question at issue clear.

From 1927 to Feb., 1931, the bankrupt carried on business in London in partnership with one Caplan, as mantle and costume manufacturers. During that period, the business, which was purely wholesale, was conducted successfully, at a modest but increasing profit. In Feb., 1931, Caplan died, and the bankrupt thereupon made an arrangement with Caplan's widow under which he took over the business, and paid her £900 by instalments for her husband's share. Up to that time, the partners had had a banking account at the Bedford Row branch of Barclays Bank. After the death of Caplan, the partnership account was closed, and a new account, known as "No. 2 Account," was opened at that branch.

After the death of Caplan, the business appears to have been far from successful, and, in the last complete year of trading, that is, the year ending Dec., 1933, the loss for the year, as shown by the balance sheet, was between £2,000 and £3,000. Eventually, about the end of Nov., 1934, the business was closed down. On Dec. 3, a receiving order was made on a creditors' petition against the bankrupt, and, on Dec. 6, the debtor was adjudicated bankrupt. The trade liabilities proved to be extremely large, and the trade creditors have undoubtedly suffered very substantial losses. As the result of investigations made by the trustees, it appeared that the bankrupt had committed serious offences against the bankruptcy laws, for which he was prosecuted to conviction, and was sentenced to two years' imprisonment.

In Apr., 1931, the respondent Mrs. Conley, the wife of the bankrupt, deposited with Barclays Bank as collateral security for the firm's over-
A draft £500 5 per cent. War Loan, and, in May, 1935, a further sum of £450 War Loan. On each occasion, she signed a memorandum of deposit, but, in my judgment, by that memorandum of deposit Mrs. Conley incurred no personal liability whatsoever, and the deposit was simply as collateral security for the firm's indebtedness with the bank.

B In Feb., 1933, the respondent Mrs. Cohen, who is the mother of the bankrupt, deposited with Barclays Bank £2,000 War Loan, and certain Building Society shares, which were subsequently realised and the proceeds invested in £450 War Loan, which was also deposited with the bank to secure the firm's overdraft. In this case, also, Mrs. Cohen signed
C a memorandum of deposit, but incurred no personal liability to the bank. In May, 1934, the bankrupt appears to have required further borrowing facilities, because, on May 24, 1934, they applied to Lloyds Bank for an overdraft of £2,250, which, on May 29, the bank appears to have sanctioned. On that day the bankrupt opened an account with Lloyds. In
D fact, the overdraft which was finally sanctioned by the bank was £1,450, and that amount was secured by the deposit by Mrs. Conley of £1,500 War Loan with Lloyds on June 16, 1934. On May 15, 1934, she signed a memorandum of deposit constituting the War Loan collateral security for the firm's overdraft, but, in my judgment, on the true construction
E of that document, she incurred no personal liability to the bank.

On June 12, 1934, the bankrupt paid his wife out of the Barclays account a sum of £1,000, and, on June 15, £200 out of Lloyds account, and it was stated that these two sums had been applied towards the purchase of the £1,500 War Loan.

F By the end of Sept., 1934, the business was, to the knowledge of the bankrupt, hopelessly insolvent, and it must have been perfectly obvious to him that it could be kept going for only a short time. With this in mind, he appears to have entered upon a course of most dishonest dealing, with a view to getting in as large a sum as possible, partly for
G his own benefit, with a view to obtaining for his wife and mother the release of the securities which they respectively had deposited with the banks.

It is unnecessary to detail the methods he adopted. It is sufficient to say that, by divers devious and dishonest means, he succeeded in getting
H in very large sums, with the result that, by Nov. 16, the firm's account with Barclays was in credit and Mrs. Cohen demanded and obtained the release of her securities, which, by her direction, were sold by the bankers, and the proceeds paid to her. On Nov. 28, Mrs. Conley demanded and obtained the return of her securities, which were also, as in the mother's case, sold at the direction of the wife, and the proceeds paid to her,

Similarly, the account with Lloyds had been put in credit, and, on Nov. 20, the wife demanded and obtained the release of her securities from that bank. On the same day, Mrs. Conley directed the bank to sell her securities, which was done, and the £950 was paid to her. On Nov. 30, the business was closed down, and on that day the bankrupt gave instructions to Barclays to stop all payments, with the inevitable result A
that he was immediately made bankrupt. Assuming all the facts that I have stated to have been proved, there can be no possible doubt that, during the months of October and November, the bankrupt was concerned to secure the position of his wife and mother in the catastrophe which he must clearly have foreseen, by enabling them to recover their B
securities from the banks. In other words, it must be taken that the payment by the bankrupt into the banks of large sums of money in Oct. and Nov., 1934, was made, partly at any rate, with a view to preferring his wife and mother. On the other hand, there is nothing whatever to suggest that he intended or desired to prefer the banks, nor, indeed, did C
such payments advantage the banks in any way, since, so long as they held the securities, they were fully protected, and could have discharged the amounts owing out of the proceeds of sale of the securities.

That being so, the question which I have to determine is whether the payments to the banks made by the bankrupt with a view to preferring D
his wife and mother constitute fraudulent preferences within the meaning of the Bankruptcy Act, 1914, s. 44. It was pointed out, on behalf of the banks, that there might be a serious difficulty in showing which particular payments could be said to constitute the preferential payments, since, during Oct. and Nov., 1934, both accounts were being freely operated E
on, by payments both in and out, and there was nothing to indicate that any particular payment in was made with a view to preferring the wife and mother. On the other hand, it was said, on behalf of the applicants, that all the payments in during those months, until the securities were realised, constituted preferences, since the object of the payments, throughout F
these periods, was to put the account into credit, and thus to enable the securities to be released.

It is unnecessary for me to consider this matter further, because, in my view, there are other grounds which render it impossible for the applicants to succeed on these motions. In my judgment, the whole G
matter can be disposed of by consideration of the true construction of the Bankruptcy Act, 1914, s. 44, the vital question being, as it appears to me, whether payments made to bankers by a person who subsequently becomes bankrupt within the prescribed period, with no intention of preferring the bankers but with a definite intention of enabling to be H
released securities deposited with the bankers as collateral security by third parties, who are under no personal liability to the banks, constitute an undue preference within the meaning of the section ?

To resolve this question, I think it is useful to consider what constitutes a fraudulent preference. The principle of the administration of the

assets in a bankruptcy is that all the creditors shall be paid rateably out of the assets of the bankruptcy, and any dealing by the bankrupt with his property during the prescribed period before bankruptcy which has for its purpose and results the prevention of such a distribution, by putting one creditor in a more advantageous position than the others, is an
A undue preference. If it be once established that money or property formerly belonging to the bankrupt has got into the hands of a creditor by undue preference, the trustee in bankruptcy can recover it, on the ground that the undue preference was in itself an act of bankruptcy, and, by virtue of the doctrine of relation back, the money or property in the
B hands of the creditor is deemed to be part of the assets in the bankruptcy, and held, therefore, by the creditor for the trustee in bankruptcy.

As the law stood before the Bankruptcy Amendment Act, 1913, in order to prove an undue preference, it was necessary to show a payment to a creditor with a view to preferring the creditor so paid, and for that
C reason it was held that a payment to a creditor with a view to prefer a surety was not an undue preference, since there was no intention to prefer the creditor: see *Re Mills, Ex p. Official Receiver* (1); nor was it possible to establish an undue preference against the surety, since he was not a creditor: *Re Warren, Ex p. Trustee* (2).

D In order to remedy that state of things, the law was amended by the Act of 1913, and that amendment is now incorporated in sect. 44 of the present Act. By that section it is provided, *inter alia*, that every payment made to a creditor with a view to preferring a creditor, or any surety or guarantor, for the debt due to such creditor within the pre-
E scribed period is an undue preference. As a matter of construction of that section, it is, in my view, reasonably plain that the payment to the creditor constitutes the undue preference, although there was no intention to prefer that creditor, with the result that the trustee in bankruptcy must recover the amount so paid from the creditor, and not from the
F surety or guarantor.

In adopting that construction, I am following a decision of CLAUSON, J., in *Re Lyons, Ex p. Barclays Bank, Ltd.* v. *Trustee* (3), with which I respectfully agree, in preference to the contrary view expressed by EVE, J., in *Re Stanley* (*G.*) *& Co.* (4).

G This would appear, at first sight, to be a wide departure from the principle, in such a case, that the money could be recovered only from a creditor to whom it had been paid with a view to preferring that creditor. However, that, in my judgment, is not really so, because, although, in such a case, the creditor may have to refund, he is left with his remedy
H against the surety or guarantor, from whom he may be able to recover the amount paid, in which case the person on whom the loss ultimately falls is the person whom it was intended to prefer.

In considering the question, which is vital in this case, of whether a payment is to a creditor with a view to preferring, not the creditor, but a person who has deposited title-deeds as collateral security but has incurred no personal liability, I am entitled to bear those considerations in mind. Apart, however, from that, in my judgment, the words " surety or guarantor ", properly construed, necessarily import a personal liability, and, therefore, exclude a mere depositor. Although, no doubt, it is true that the depositor runs the risk of having his property, which he has deposited, taken to pay the debtor's debt, he himself neither guarantees payment of the debt, nor is he surety for the debtor. He can, in no circumstances, be sued by the creditor, and there is no contractual relation between himself and the creditor, except to the limited extent arising out of the deposit of the deeds. In my judgment, it cannot be said that the words " surety or guarantor " include a mere depositor.

Sect. 44 is a quasi-penal section, and must be construed strictly. I ought not to put upon the words in that section a meaning which they do not properly bear. Moreover, such construction seems to me to be in accordance with the general principles stated above. If I am to construe " surety or guarantor " as including a depositor, it will necessarily result in a wide departure from these general principles, since it will mean that a creditor to whom payment was made, with no intention to prefer that creditor, will be made liable to repay, with no remedy over against the person intended to be preferred. Once the creditor has parted with the securities to the depositor, his rights as against the depositor or his property are at an end, and he has no means of recovering payment from the depositor. I am unable to bring myself to think that so wide a departure from settled principles in this regard was intended by words which are strictly not apt for the purpose.

I have been warned by counsel for the applicants of the serious consequences which he suggests will ensue if I do not accept his construction of the section, and I am told that the commercial world waits in trepidation a decision which will, according to him, open wide the door for frauds on innocent creditors. If my construction of the section has such a result, I shall regret it ; but, if I have rightly construed the Act, it is for the legislature to deal with the matter. I may, however, point out that the opposite construction of the section would operate very hardly on bankers. So long as the customer's account is open, they cannot refuse to accept money paid in. Nor can they refuse to release the deposited securities to the depositor, so long as the account is in credit, when the demand to deliver up is made, subject to the giving of any proper notice which may be required. If, therefore, a debtor could ensure, by such means as were adopted in this case, that the depositor's property was returned to him intact, he would be doing so at the expense of the banks, whom he had no desire to prefer, and who could not protect themselves by refusing either to receive the money paid in or to part with the securities, when called upon to do so by the depositor, so long as the account was in credit.

These, however, are matters with which I am not primarily concerned. I have to construe the section, and, putting the construction which I

do upon it, it follows that the applicants cannot succeed on either of the motions, nor could they have succeeded if all the facts which were opened had been conclusively proved. The motions as against the banks must fail, because the payments sought to be impeached were not made with a view to preferring them. As to the paramount importance
A of establishing such intention, see *Peat* (*Sir William Henry*) v. *Gresham Trust, Ltd.* (5). They cannot succeed against the other respondents, because those respondents, who were the persons it was intended to prefer, are not creditors of the bankrupt within the meaning of the section. For these reasons, in my judgment, both these motions must
B fail, and must be dismissed with costs.

Bacon : In those circumstances, will your Lordship make an order under R.S.C., Ord. 50, r. 3, for the preservation of this property in the hands of the respondent relatives pending an appeal ? As your Lordship appreciates, they received back their stocks.

C Farwell, J. : No, they did not, they received money.

Bacon : If your Lordship pleases—in one case stock, and in two cases money. For the purpose of this application, in my submission they are on the same footing, with reference to your Lordship's jurisdiction to make an order for the preservation of the subject-matter of these
D proceedings.

Farwell, J. : I appreciate that that might apply in the case of securities, but there is no earmarked property here. It is not a case of following property in the hands of the trustees where you can follow at certain places. How can I make an order when it is only a question of
E pounds, shillings and pence ?

Bacon : I have an authority here of *Wanklyn* v. *Wilson* (6) which I think is an authority for this proposition that the rule does give your Lordship jurisdiction to make an order for a payment of a sum of money into court. It is quite simple. In fact, the exact sums are known, so
F far as the money here at stake is concerned. In one case, it was a sum of money, in the second case, it was a sum of money, and, in the third case, it will be the value of the stocks, as at the time when they were released. Your Lordship will find, on looking at the authorities, that there are no difficulties in the way of making the order for which I ask
G under R.S.C., Ord. 50, r. 3. Perhaps I might remind your Lordship of the terms of R.S.C., Ord. 50, r. 3 :

> It shall be lawful for the court or a judge, upon the application of any party to a cause or matter, and upon such terms as may be just, to make any order for the detention, preservation, or inspection of any property or thing, being the subject of such cause or matter, or as to which any question may arise therein. . . .

H The rest of the rule is not applicable to this case. *Wanklyn* v. *Wilson* (6) was a case in which there was an action for an account.

Farwell, J. : But in that case, you see, the court was satisfied that there was a sum due, and directed payment into court of the amount. But I know of no authority for saying that, where it is not a matter of any specific property, or following any specific sum of money, or anything of that sort, but merely a claim for money generally, you can make such an order.

Bacon : May I refer your Lordship a little more in detail to the rules under R.S.C., Ord. 50. Rule 6 lays it down that :

> An application for an order under sect. 45 of the Act [the Judicature Act, 1925], or under rr. 2 or 3 of this order, may be made to the court or a judge by any party. If the application be by the plaintiff for an order under the said section 45, it may be made either *ex parte* or with notice, and if for an order under rr. 2 or 3 of this order it may be made after notice to the defendant at any time after the issue of the writ of summons, and if it be by any other party, then on notice to the plaintiff and at any time after appearance by the party making the application.

Sect. 45 of the Act, which also gives your Lordship jurisdiction, is in these terms :

> The High Court may grant a mandamus or an injunction or appoint a receiver by an interlocutory order in all cases in which it appears to the court to be just or convenient so to do.

Then there are bankruptcy rules dealing with this matter also, by the Bankruptcy Rules, r. 27, which is in these terms :

> Where any party, other than the applicant, is affected by the motion, no order shall be made, unless upon the consent of such party duly shown to the court, or upon proof that notice of the intended motion and a copy of the affidavits in support thereof have been duly served upon such party : Provided that the court, if satisfied that the delay caused by proceeding in the ordinary way would or might entail serious mischief, may make any order *ex parte* upon such terms as to costs and otherwise, and subject to such undertaking, if any, as the court may think just . . .

In my submission, that rule, taking into consideration R.S.C., Ord. 50, r. 3, and, if necessary, sect. 45 of the Act, gives your Lordship ample jurisdiction to make here and now an order that that money be paid into court. The case of *Wanklyn* v. *Wilson* (6) is a case in which there was an action for an account, and it was clear to the court what would be due, if anything was due, and they made the order.

Farwell, J. : I do not think that you are stating it quite accurately. What happened in that case was this. The court was satisfied that a particular sum would be due, and ordered that that sum be paid into court pending ascertainment of whether any further amount was due. That is common practice in this Division. It is quite common practice in the Chancery Division, where the court is satisfied that a particular sum is due in any event, and where there may be further sums, to order that the sum be paid into court. That is done frequently. But I really do not appreciate this application of yours. I should have thought, myself, that it was reasonably plain that, if you succeed on the appeal, it will not be on the ground that you can get an order against the mother or wife of the bankrupt, but on the ground that you can get an order against the banks. If so, it is quite unnecessary. Both Barclays and Lloyds can pay even the sums you are demanding. I am not going to make any special order.

Both motions dismissed with costs.

Solicitors : *F. W. Perkins* (for the trustees) ; *Durrant Cooper & Hambling* (for Barclays Bank, Ltd.) ; *Linklaters & Paines* (for Lloyds Bank, Ltd.) ; *Messrs. Lucien Fior* (for Mrs. Bessie Cohen and Mrs. Hannah Conley).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

Re COPELIN'S CONTRACT.

[CHANCERY DIVISION (Crossman, J.), **November 5, 11, 17, 18, 1937.**]

Sale of Land—Title—Abstract—Deed over 30 *years old—Execution under power of attorney—Abstract of power of attorney.*

Upon a sale of land in 1936, the abstract of title commenced with a deed, dated Dec. 12, 1900, and the abstract of that deed ended with the words "executed and attested." It subsequently appeared that this deed had been executed under a power of attorney. The vendor had made a special condition, which was intended to exclude any requisition referring to this power of attorney, but, by inadvertence, the condition failed to do so. It was contended that, as the deed was over 30 years old, no proof of execution was necessary :—

HELD : the purchaser was entitled to require an abstract or a copy of the power of attorney, and, as this could not be done, the deposit must be returned.

[EDITORIAL NOTE. In this case, the root of title was over 30 years old, and it was argued that, for that reason, it was unnecessary to produce the power of attorney under which it was executed. The court has decided against the vendor holding that even if production of the power cannot be required, at least an abstract of it must be given.

AS TO DEEDS EXECUTED BY ATTORNEY, see HALSBURY, 1st Edn., Vol. 25, Sale of Land, p. 350, para. 587 ; and FOR CASES, see DIGEST, Vol. 1, pp. 384-387, Nos. 886-905.]

Cases referred to :

(1) *Eaton* v. *Sanxter* (1834), 6 Sim. 517 ; 40 Digest 295, *2545* ; 3 L.J.Ch. 197.

(2) *Re Airey, Airey* v. *Stapleton*, [1897] 1 Ch. 164 ; 1 Digest 386, *900* ; 66 L.J.Ch. 152 ; 76 L.T. 151.

VENDOR AND PURCHASER SUMMONS. A contract was entered into on Dec. 12, 1936, between Gladys Copelin and Ernest William Bartlett for the sale of certain freehold property known as 27, Fashoda Road, Bromley, Kent, and by this summons the purchaser asked (i) that it might be declared that the requisitions and objections made by him to the title to the property comprised in the contract had not been sufficiently answered by the vendor, and that a good title to the property had not been shown in accordance with the particulars and conditions of sale ; (ii) that the vendor be ordered to repay to the purchaser the sum of £60, the amount of his deposit, together with interest thereon at the rate of 4 per cent. per annum from Dec. 10, 1936, until repayment ; (iii) that the vendor be ordered to pay to the purchaser his costs of investigating the title to the property and of this application.

R. Cozens Hardy Horne for the applicant : One objection is that there was a defect of title which was not disclosed, or was disclosed in a misleading way by a special condition. The deed, which is the root of title, now appears to have been executed under a power of attorney. The power of attorney cannot be found, and all that has been tendered is a statement by some one who has never seen the power of attorney, but who believes that it once existed. [Counsel referred to *Eaton* v. *Sanxter* (1).]

F. E. Skone James for the respondent : In the case of a deed over 30 years old, there is no neeed to produce the power of attorney under which the conveyance was executed, because the conveyance proves itself. If it can be found in the attestation of such a deed that it was executed by someone on behalf of somebody else, the law presumes that it was so executed. In dealing with an old deed, it may not be necessary to abstract the power, because of the presumption of due execution. This deed was 30 years old. [Counsel referred to *Re Airey, Airey* v. *Stapleton* (2).]

Crossman, J. : This is an application by originating summons under the Law of Property Act, 1925, s. 49. The summons is dated May 24, 1937, and the application is by Ernest William Bartlett, the purchaser under a contract of sale dated Dec. 10, 1936. The contract is for the sale of freehold property at 27, Fashoda Road, Bromley, Kent, and the applicant asks for an order that it may be declared that the requisitions and objections with respect to the title to the property comprised in the contract have not been sufficiently answered by the vendor, and that a good title has not been shown in accordance with the particulars and conditions of sale. Also, that the vendor may be ordered to repay the amount of the deposit, together with interest thereon at the rate of 4 per cent. per annum from Dec. 10, 1936, until repayment. Also that the vendor may be ordered to pay to the purchaser the costs of investigating the title to the property, and the costs of this application.

The contract of sale, dated Dec. 10, 1936, states that Ernest William Bartlett has bought the property described, and has paid to the auctioneers a deposit of £60, and agrees to pay the balance of the purchase money and to complete the sale subject to the conditions of sale. The special conditions of sale, which are printed on the same document as the memorandum, begin by incorporating the National Conditions of Sale, 13th Edn. Clause 2 provides for the payment of a deposit of 10 per cent., which in fact was paid, £60 being paid by the purchaser to the vendor immediately after the sale. Clause 4 provides that the purchase shall be completed by Jan. 8, 1937. By cl. 6, the title is to commence with a conveyance on sale dated Dec. 12, 1900. By cl. 8, the said conveyance of Dec. 12, 1900, was expressed to be made in exercise of a power, and it was stated that the purchaser should assume that the formalities prescribed by the instrument which conferred the power were duly complied with, and should not require the production of such instrument, nor take any objection in respect thereof. Then there are the general conditions, which are incorporated in the contract. The material ones are 4, 9 and 20. No. 4 is the usual condition as to the delivery of the abstract, and the delivery of requisitions and replies, and the right of rescission which is given to the vendor if the purchaser shall insist upon any objection or requisition which the vendor shall be unable on good grounds to remove or comply with.

Condition 9 is the usual condition as to identity. Condition 20 contains the power to re-sell:

> (1) If the purchaser shall fail or neglect to complete his purchase according to these conditions, his deposit shall thereupon be forfeited (unless the court otherwise directs) to the vendor or (in the case of settled land) to his settled land trustees, and the vendor may, with or without notice or without tendering a conveyance, re-sell the property at such time, in such manner and subject to such conditions as he shall think fit.
>
> (2) Any loss caused by expense of and incidental to the present sale or such re-sale, or any unsuccessful attempt to re-sell, or by diminution in price, or both, shall (after crediting the deposit, unless returned) be immediately paid by the defaulter to the vendor.

As a matter of fact, the vendor re-sold at a lower price, and he says that he is entitled to claim the difference from the applicant.

On Dec. 15, 1936, the vendor's solicitors delivered the abstract of title to the purchaser. The abstract commences with a conveyance dated Dec. 12, 1900. The conveyance made by this deed was to two ladies, Elizabeth Savill and Emily Savill, and their heirs and assigns, of three plots of land on Fashoda Road in fee simple. The words at the end of the abstract are simply "executed and attested." There is nothing in the abstract to show that there was anything unusual about the execution or the attestation. The abstract shows that, on July 28, 1927, the three plots of land (known as Nos. 152, 153 and 154) had become vested in one Joseph Edward Tyler in fee simple, and that on that date he conveyed certain property to Charles William Copelin. That property is described. [His Lordship read the description.] Mr. Copelin, to whom the conveyance was made, died on Jan. 9, 1936, and the vendor sold as his executrix. There is nothing on that which is material to the title.

On Dec. 23, 1936, after the date of the contract, the purchaser's solicitors delivered their requisitions of title on that abstract. The abstract had been delivered on Dec. 16, so it was a week afterwards, which was a reasonable time. There is a number of requisitions, but the only one which is material to this application is No. 9 (*a*), which is to this effect:

> In condition 8 of the special conditions of sale it is stated that the conveyance of Dec. 12, 1900, is expressed to be made in exercise of a power. According to the abstract one undivided third was conveyed in exercise of the trust for sale in the will of Joseph Bourne. Is this the power referred to in the condition?

The answer is:

> The reason for the special condition is on account of the fact that the conveyance of Dec. 12, 1900, is executed by Sir John Jaffray, by attorney.

The condition would really relate to a case where a deed was executed in the exercise of a power and the vendor wished to protect himself, but that, in my view, does not affect the liability of the vendor arising from the fact that the conveyance was executed by attorney. This fact does not appear on the abstract in any way. It should have shown that the deed of 1900 was executed under a power of attorney of such a date, or of a date not known. Naturally the purchaser thought from the special condition that there was something quite different which it was not desired to disclose.

The replies were received by the purchaser's solicitor on Dec. 30, 1936. On Dec. 31, 1936, the purchaser's solicitor delivered certain observations on the replies, and referred to No. 9 (*a*), which dealt with A the explanation of what the special condition was. He said :

> Has the vendor a copy or abstract of the power of attorney ? Was it filed at the Central Office, and, if so, on what date ? It is not admitted that special condition 8 is applicable to the circumstances appearing in the reply. Pending inspection of the deed the requisition is repeated.

B

The answer is :

> We have no information. The special condition is taken from PRIDEAUX, 22nd Edn., Vol. 1, p. 273.

That was a most unfortunate reply. By an unfortunate mistake, the C wrong condition had been put in, and the vendor made no effort to deal with the purchaser's requisition when he asked for the power of attorney. The power of attorney could not be found, and there was no means of producing the original.

The purchaser, being unable to get back his deposit, issued this D summons. It was issued as far back as last May. The contract is at an end, and cannot possibly be completed now. The first paragraph of the summons cannot now be applicable. It is now immaterial that the requisitions have not been sufficiently answered. The question now is whether the vendor was entitled to act as she did, and, if not, is not E the purchaser entitled to have his deposit repaid, and to recover his costs of investigating the title. Requisition 9 (*a*) is the requisition which I have to consider. It is based upon the ground that the vendor discloses the fact that the conveyance forming the root of title was executed under a power of attorney. I hold, and hold to some extent F on the authority of the proposition in WILLIAMS' VENDOR AND PURCHASER, 4th Edn., p. 160, that it was the duty of the vendor, the conveyance having been executed by attorney, to furnish an abstract or copy of the power of attorney, and hand it over to the purchaser. That authority is as follows :

G

> Whenever any title deed has been executed by attorney, the deed creating the power of attorney so acted upon ought to be abstracted and produced ; and either it should be handed over to the purchaser on completion, or (if the vendor or any other person is entitled to retain it) a statutory acknowledgment and undertaking should be given for its production and safe custody.

I think, myself, that the vendor was bound to furnish an abstract or H copy of the power of attorney. He was in default there, because he never disclosed that the conveyance was executed under a power of attorney. The real trouble arises from the fact that the original abstract was insufficient, the power not having been set out, and it not being stated by whom it was executed. In my view, special condition 8 dealt with some quite different matter. The Law of Property Act, 1925, s. 45, provides that the purchaser of any property shall not:

> (*a*) require the production, or any abstract or copy, of any deed, will, or other document, dated or made before the time prescribed by law, or stipulated, for the commencement of the title, even though the same creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser.

If that stood alone, it might prevent the purchaser from requiring the production, but there is this proviso:

> Provided that this subsection shall not deprive a purchaser of the right to require the production, or an abstract or copy of—(i) any power of attorney under which any abstracted document is executed.

It may be said that the section contemplates that the purchaser has a right to require it, and I hold that the purchaser has a right to require an abstract or a copy of the power, and it has not been supplied in this case. Therefore, the vendor was in default, and she never put herself right on this point. [His Lordship considered the question of identity of the parcels.]

I propose to make an order, under para. 2, that the vendor do repay the sum of £60, together with interest at the rate of 4 per cent. per annum, to Ernest William Bartlett, and also to pay to him his costs of investigating the title. Also, that the respondent shall pay to the applicant the taxed costs of this application.

Solicitors: *Edward Fail* (for the applicant); *Watkins, Pulleyn & Ellison*, agents for *Couves & Spain*, Gravesend (for the respondent).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

Re TWO SOLICITORS.

[Court of Appeal (Greer and Scott, L.JJ., and Luxmoore, J.), **October 19, November 22, 1937.**]

Solicitors—Application to Disciplinary Committee of the Law Society—Allegations of professional impropriety—Applicant not present before committee—Order by committee dismissing application—Appeal to the Divisional Court—Appellant not represented by counsel—Refusal by Divisional Court to hear the appeal—Solicitors Act, 1932 (*c.* 37), *s.* 8.

The appellant made an application, supported by an affidavit, to the Disciplinary Committee of the Law Society, alleging professional impropriety on the part of two solicitors. The committee made an order dismissing the application, without calling on the two solicitors to answer it, and without hearing the applicant. The applicant appealed against this order to the Divisional Court, which refused to hear the appeal, on the ground that the appellant was not represented by counsel:—

Held: (i) the applicant was entitled to be heard by the Disciplinary Committee on the question as to whether she had made out a *prima facie* case. Any rule purporting to give the committee power to dismiss an application without having heard the applicant is void as being contrary to natural justice, and *ultra vires*.

(ii) (Luxmoore, J., dissenting): the appellant was entitled to appeal to the Divisional Court.

(iii) the appellant was entitled to appear in person before the Divisional Court.

(iv) on the facts of this case, if the Divisional Court had heard the appeal, they would have been bound to dismiss it, as the facts stated in the affidavit did not support the application, and further because the two solicitors, not having been served with the notice of appeal, were not before that court. The present appeal, therefore, must be dismissed, as the respondent was entitled to support the decision of the court below upon any sufficient ground, whether or not it be the ground on which the court below decided the matter.

[**EDITORIAL NOTE.** Where an application is made to a disciplinary tribunal for the correction of a person responsible to it, it is necessary, before such an application is dismissed as frivolous, that the tribunal should hear the applicant. It is a fundamental rule of justice that, where there is an appeal from any order, the appellant is entitled to appear in person in support of the appeal.

As TO APPLICATION TO THE DISCIPLINARY COMMITTEE, see HALSBURY, Supp., Solicitors, paras. 1380-1388; and FOR CASES, see DIGEST, Vol. 42, pp. 406-408, Nos. 4633-4665.]

Cases referred to:

(1) *Re A Solicitor, Ex p. Incorporated Law Society*, [1903] 1 K.B. 857; *affd.*, [1903] 2 K.B. 205; Digest Supp.; 72 L.J.K.B. 643; 89 L.T. 118.

(2) *Ex p. Pitt* (1834), 5 B. & Ad. 1077; Digest Supp.

(3) *Re A Solicitor*, [1934] 2 K.B. 463; Digest Supp.; 103 L.J.K.B. 719; 152 L.T. 22.

(4) *R.* v. *London County Keepers of the Peace & JJ.* (1890), 25 Q.B.D. 357; 26 Digest 460, *1760*; 59 L.J.M.C. 146; 63 L.T. 243.

(5) *Re Hardwick* (1883), 12 Q.B.D. 148; 42 Digest 408, *4661*; 53 L.J.Q.B. 64; 49 L.T. 584.

(6) *Re A Solicitor* (*No.* 2) (1924), 93 L.J.K.B. 761; 42 Digest 407, *4655*; 131 L.T. 155.

APPEAL from a decision of the Divisional Court (LORD HEWART, L.C.J., SWIFT and GODDARD, JJ.), dated Feb. 2, 1937.

The facts of the case are fully set out in the judgments.

Maurice Share, for the appellant: In *Ex p. Pitt* (2) it was decided that a barrister must be present, because that was a criminal matter. This is not a criminal matter, but a disciplinary one, and there is no need for counsel to be present: see *Re Hardwick* (5). There is a clear distinction between criminal and disciplinary proceedings, namely, that the Crown is not a party to the latter. There is nothing to prevent the Disciplinary Committee from hearing a second application based on the same facts, but with further evidence. The Solicitors Act, 1932, s. 5, takes away the jurisdiction of the Divisional Court and gives it to the Law Society. Therefore, if the applicant must be represented by counsel before the Divisional Court, she must also be so represented before the Disciplinary Committee. That is a denial of justice to any applicant who cannot afford to employ counsel.

W. M. Andrew, for the respondent: The principle is that the court will protect its officers against frivolous or vexatious complaints. In *Re A Solicitor* (3) it was held that no appeal lay to the Divisional Court from an acquittal by the Disciplinary Committee.

Share, in reply: In *Re A Solicitor* (3) there was no order made by the Law Society. Here there is, and a right of appeal is specifically given by statute to the applicant. [Counsel referred to *R.* v. *London County Keepers of the Peace & JJ.* (4), *Re Hardwick* (5), and *Re A Solicitor* (*No.* 2) (6).]

GREER, L.J.: On Oct. 14, 1936, the appellant, Marion Marshall, made an application in writing to the Disciplinary Committee of the Law Society constituted under the Solicitors Act, 1932. This court was not provided with a copy of this application, but, as no objection was taken by the Committee, or by the Divisional Court, that the application was not in the form in which it should have been according to r. 4 of the rules made in pursuance of the powers given to the committee by the provisions of the Solicitors Act, 1932, s. 6 (1), we are entitled to assume that the application was in the form required by the regulations and the schedule thereto. On Oct. 17, 1936, the applicant swore an affidavit purporting to support her application, and sent it to the committee. On Nov. 5, the committee met, and, in the absence of the appellant and the two solicitors concerned, made an order dismissing the application without requiring the two solicitors to answer the application. In my judgment, the committee were wrong in making this order without giving the appellant an opportunity of contending, either by herself or by counsel, that she had made out a *prima facie* case against the solicitors. Under r. 2 of the rules under sect. 6 (1) it is provided:

> Before fixing a day for the hearing the committee may require the applicant to supply such further information and documents relating to the allegations as they think fit, and in any case where, in the opinion of the committee, no *prima facie* case is shown the committee may, without requiring the solicitor to answer the allegations, dismiss the application. If required so to do, either by the applicant or the solicitor, the committee shall make a formal order dismissing such application.

That rule seems to me to involve that both the applicant and the solicitor should be present at the hearing of the application as to whether a *prima facie* case has been made out, because neither of them could ask for a formal order to be made dismissing the application, if they were not present when the application was made. On the question whether she had made out a *prima facie* case, the appellant was entitled to be heard. In my judgment, the committee, in making the order they made on Nov. 5 without hearing the appellant, were acting in a manner inconsistent with natural justice, which requires that no judgment or order affecting the position or rights of an applicant for a decision in which the applicant is interested should be made without giving such applicant an opportunity of being heard in support of the application. I do not think that the regulations or the rules justify what the committee did, and, if there be a regulation or rule which purports to do so, it would, in my judgment, be *ultra vires*. After the order of Nov. 5, by notice of motion the appellant appealed to the Divisional Court of the King's Bench

Division, as she was, in my opinion, entitled to do by the Solicitors Act, 1932, s. 8. Her notice of appeal reads as follows:

> Take notice that this honourable court will be moved upon the expiration of 14 days from the service upon you of this notice or so soon thereafter as the appellant may be heard by way of appeal from the order of the Disciplinary Committee constituted under the Solicitors Act, 1932, dated Nov. 5, 1936, for an order that the above two solicitors shall be required to answer the allegations contained in the A affidavit of Oct. 17, 1936, accompanying the application to the Disciplinary Committee and for an order that the Disciplinary Committee shall hear and determine these allegations or that any other order shall be made as the court shall think fit for the determination of these allegations. And further take notice that the grounds of this appeal are: That it appears that in the matter referred to in the above-mentioned affidavit the two solicitors have acted in a way that is not in accordance with the definition of proper conduct and further it appears that they B have on the occasions referred to in the same affidavit intentionally misled and also deceived the court. And, further, it is held that only by a full hearing of the facts and the full evidence in the matter of the affidavit can a determination be come to.

It will be observed that she did not appeal on the ground that she had not been heard by the committee on the question whether a *prima facie* case had been made by her affidavit, and, in my judgment, without an C amendment of her notice of appeal to the Divisional Court, she would not have been entitled to raise this question. Her ground of appeal, as stated in her notice, was that, on the statements contained in her affidavit, the committee should have made an order calling on the two solicitors to answer the allegations of misconduct contained in the D affidavit.

On Feb. 2, 1937, after several adjournments, the Divisional Court made an order in the words following:

> Upon reading the notice of appeal herein upon hearing Mr. Andrew of counsel for the respondent the Registrar of Solicitors, Marion Marshall the appellant not being E represented by counsel, it is ordered that the appeal of Marion Marshall from the order of the Disciplinary Committee constituted under the Solicitors Act, 1932, dated Nov. 5, 1936, for an order that the above two solicitors should be required to answer the allegations contained in the affidavit of Oct. 17, 1936, accompanying the application to the Disciplinary Committee and for an order that the Disciplinary Committee should hear and determine these allegations be dismissed with costs to be paid by the said appellant Marion Marshall to the said Registrar of Solicitors F or his solicitor such costs to be taxed by a taxing master. And it is further ordered that the said appellant's application for leave to appeal to His Majesty's Court of Appeal be dismissed.

It was stated by the appellant's counsel, and admitted by counsel for the Law Society, that the order was made solely on the ground that the court were not entitled to hear the appellant in person, and that she G would be heard in the appeal only if it was supported by counsel. In my judgment, they were wrong in so holding, but we are, I think, entitled to dismiss this appeal on the ground that, if they had heard the appellant and had read her affidavit, they would have been bound to dismiss the appeal. A respondent is entitled to support a judgment on any sufficient H ground, whether or not it be the ground on which the court below decided the matter. The appellant's affidavit, which was before the committee, is to a large extent unintelligible, and such charges as may, on a careful analysis, appear to be made by it against the two solicitors are absurd, and without any foundation on the facts stated in the affidavit. The committee were, in my judgment, justified in holding that no *prima facie* case had been made out for calling on the two solicitors to answer the charges of misconduct, if any, that were contained in the affidavit, though, as I have said, they ought to have heard the appellant before making the order of Nov. 5. If they had heard her, they would have been bound A to dismiss her application, as she could not have supported her application on any grounds other than those stated in her affidavit. For these reasons, I think that the order of the Divisional Court was right, though they ought to have heard her argument, notwithstanding the fact that she had not instructed a barrister to appear for her.

B The question whether an appellant from an order made by the committee can be refused a hearing if she does not appear by counsel is a difficult question to answer. The Solicitors Act, 1932, s. 8, reproduced a similar provision in a statute of 1919. Before that Act became law, the committee had no power to make any order against a solicitor with C reference to charges of misconduct. The committee had to report to the High Court. On considering the report, it lay with the court to decide whether any order should be made against the solicitor concerned, and, if they thought that such an order should be made, to make such order as the court deemed right. On such an application, D it had been decided that the complainant could not be heard in person, but could be heard only by some member of the Bar briefed by her. This was finally determined by a Divisional Court in *Re A Solicitor, Ex parte Incorporated Law Society* (1), following the decision of LORD DENMAN, C.J., in *Ex p. Pitt* (2). The head-note of the first-mentioned E case reads as follows:

> Section 13 of the Solicitors Act, 1888, by which an application to strike the name of a solicitor off the rolls, or to require him to answer allegations contained in an affidavit, is to be heard by a committee of the Incorporated Law Society, who are to embody their finding in a report to the High Court, provides that any person who but for the Act would have been entitled to apply to the court to strike a F solicitor off the rolls, or to require him to answer allegations, shall still be entitled so to apply, "and shall be entitled to be heard if the society brings the report of the committee before the court":—*Held*, that such an applicant could not be heard in person, but must appear by counsel.

In giving judgment, LORD ALVERSTONE, L.C.J., said, at p. 859:

> It has been for many years the practice where applications are made against G solicitors to require that they shall be conducted by counsel. The Act of 1888 only provides a modified, improved, and amended procedure, whereby the report of the statutory committee is brought before the court, and action is taken thereon. . . . According to the old practice there were two applications which might be made against a solicitor—one to strike him off the rolls, and the other to call upon him to answer the matters contained in an affidavit. The court was dealing, therefore, in that case, with the less serious form of application. The application was made to four judges, and LORD DENMAN, after consulting the other judges and the H Master of the Crown Office, said this: "The motion against an attorney being in the nature of a criminal information, the court requires that it should be made by a gentleman at the bar; and it cannot be made in person. Otherwise, we have not the sanction of a barrister for the propriety of such an application . . ."

WILLS, J., said, at p. 860:

> I entirely agree. I have had a very considerable experience in cases of this kind, as for a long period when at the bar I represented the Law Society, and, during the

fifty years and rather more that I have been in the profession, I have never known a case in which an application of this kind was heard either before or since the Act of 1888 in which the matter was not conducted by counsel.

I think that we cannot now overrule a practice that has been followed ever since the decision of *Ex p. Pitt* (2). But we are entitled to hold that the rule has no application to the hearing of an appeal from an order made by the Disciplinary Committee. A Where there is an appeal from any order, the appellant is, in my judgment, entitled to support the appeal in person. This is a fundamental rule of justice which, in my judgment, applies to all appeals, including an appeal from an order made by the Disciplinary Committee of the Law Society, but, inasmuch as the Divisional Court, if they had heard the appellant, would of B necessity have made an order dismissing the appeal, for the reasons above stated, I think that this appeal should be dismissed with costs.

Having regard to the decision above indicated, that the Divisional Court were wrong in refusing to hear the appellant, it seems necessary to decide what this court should do, C that is to say, whether it should send the case back to the Divisional Court for a re-hearing or whether it should give judgment dismissing the appeal. It seems to me that, quite apart from their refusal to hear the appellant, the Divisional Court had good grounds for dismissing the appeal, first, because the two solicitors in question had not been served with the notice of appeal and D were not present at the hearing, and, secondly, because, even if they had been present, the court would have been bound to dismiss the appeal, on the ground that nobody could by any possibility say that the materials contained in the appellant's affidavit were sufficient to establish a *prima facie* case. E

SCOTT, L.J.: In this case, the appellant was a person who had had litigation, and who, in connection with it, had several times changed her solicitors, in the end being dissatisfied with the result of the legal proceedings in which she was concerned. What the merits of those F proceedings were is irrelevant to the present question. As a result of them, she made a long affidavit on Oct. 17, 1936, complaining against two solicitors, for the purpose of complaining against them before the Disciplinary Committee of the Law Society. This affidavit was duly submitted, through the Registrar of the Law Society, to the committee, G who, on Nov. 5, 1936, without hearing the complainant, issued a document entitled FINDINGS AND ORDER, reciting the application and its perusal, and that the committee were of opinion that no *prima facie* case was shown against the said two solicitors, and ordering that the application be dismissed, without requiring the said two solicitors to H answer the said allegations. This was signed by Sir Roger Gregory, the chairman of the committee, and duly transmitted to the complainant by the registrar. The procedure adopted by the committee was in accordance with the provisions of r. 2 of the rules made by the committee, with the concurrence of the Master of the Rolls, on July 28, 1932, in purported pursuance of the Solicitors Act, 1932, s. 6. That rule is as follows:

> Before fixing a day for the hearing the committee may require the applicant to supply such further information and documents relating to the allegations as they think fit, and in any case where, in the opinion of the committee, no *prima facie* case is shown, the committee may, without requiring the solicitor to answer the allegations, dismiss the application. If required so to do, either by the applicant or the solicitor, the committee shall make a formal order dismissing such application.

The terms of this rule purport to confer on the committee, acting on its own initiative, a power similar to that conferred by R.S.C., Ord. 25, r. 4, upon the court or a judge upon an application by the defendant to dismiss an action on the ground that no reasonable cause of action is disclosed. Rule 3 provides that, in a case in which, in the opinion of the committee, a *prima facie* case is shown, the committee shall fix a day for hearing; and appropriate provisions are contained in that and the next two rules for the conduct of the proceedings in a manner calculated to give to both parties to the dispute the necessary information and opportunities of establishing their case. These further rules cause me to interpret r. 2 differently from the way in which it was interpreted by Greer, L.J. I think that they make it clear that r. 2 really does authorise the committee in their discretion to dispense with any hearing at all, and, without hearing even the applicant, to dismiss the application merely upon the internal evidence of the affidavit of complaint. That is what the committee did in the present case. But such a rule is, in my opinion, *ultra vires*, as the Act requires a hearing, and I think, on that ground, that the committee's action was wrong; they had power to dismiss only after hearing the applicant, as required by the statute, and not otherwise.

The complainant was dissatisfied with the action taken by the committee, and thereupon, availing herself of sect. 8 of the Act of 1932, gave notice of appeal to the Divisional Court, asking for an order that the solicitors should be required to answer the allegations contained in the affidavit, and that the Disciplinary Committee should hear and determine the allegations, or that the court should make such other order as it might think fit for the determination of the allegations. The grounds of appeal alleged were that the affidavit disclosed improper conduct by the solicitors, and that a full hearing was necessary before a determination could properly be reached. This notice of appeal was served on the Registrar of the Law Society, but not personally on the two solicitors. When the appeal came on before the Divisional Court, counsel who was instructed to prosecute the appeal on behalf of the appellant was ill, both on the first and on three other occasions, and the court on the fourth occasion (Feb. 2, 1937) refused to grant any further adjournment for counsel. The appellant then asked to be heard in person, but the court, as we were informed by Mr. Share, who appeared for her before us, refused to hear her, and also refused leave to appeal. The Court of Appeal, however, subsequently gave leave to appeal, and extended the time for appealing.

On the hearing before us, it was contended on her behalf (i) that sect. 8 of the Act gave her an absolute right of appeal, and (ii) that she was entitled, as a litigant party, to be heard in person in the Divisional Court, as she asked to be in the absence of her counsel. The merits of the allegations contained in the affidavit were not discussed before us, although, having read it, I am not surprised that the Disciplinary Com- A mittee took the view that there was put forward by the applicant no intelligible case which it was right to call upon the two solicitors to answer. Strictly speaking, that question is not before us now, as we have to deal with the above questions of law only ; but I will return to it later. The only party to the appeal appearing before us was the B applicant. The Law Society was represented by counsel on the appeal, technically as a respondent, in reality to give such assistance to the court as might be helpful, or desired. There was no other respondent, for, as in the court below, neither of the two solicitors had been served with notice of appeal. This omission was, as has been pointed out by C GREER, L.J., fatal to both appeals, and, on that ground, this appeal must be dismissed.

It is not without hesitation that I say anything more, but questions of principle have been discussed, and the discussion seems to me to indicate danger of misconception on certain matters of practical import- D ance in the working of this part of the Solicitors Act, so I venture to deal with the chief points.

On the question of the appellant's right of audience as a litigant in person, we were informed that the Divisional Court expressed the view that they must follow the decision in the case of *Re A Solicitor, Ex p.* E *Incorporated Law Society* (1). In that case, both courts held that, upon consideration by the court of a report from the Disciplinary Committee of the Law Society, pursuant to the Solicitors Act, 1888, s. 13, now repealed, it was a settled rule of the court that an applicant must appear by counsel, following the old practice in the case of applications to the F court direct at a time before the Disciplinary Committee of the Law Society had been created by statute. Had the decision in the Court of Appeal in that case been applicable to the question before us in the present case, we should have been bound to follow it ; but, in my view, the position of the court, on consideration of a report from the Law Society G under the Act of 1888, was different from the position of the court on an appeal from the Disciplinary Committee under the present statutory system, which was first introduced by sect. 5 of the Act of 1919. That Act abolished the report procedure, substituted the Disciplinary Com- mittee for the court, and made it a court of first instance, with power H and duty to inquire into and decide allegations against solicitors, and generally to exercise the disciplinary jurisdiction previously exercised by the court itself. Sect. 5 said that the committee should :

> upon every such application have power, after hearing the case, to make any such order as to striking off the Roll . . . as before the commencement of this Act the

court or the Master of the Rolls (as the case may be) would have had power to make upon a report of the committee made to the court or the Master of the Rolls pursuant to the provisions of sect. 13 of the principal Act.

Sect. 8 of the Act of 1919 was in the following terms:

> A An appeal to the court from any order of the committee made under the powers of this Act shall lie at the instance either of the applicant or of the solicitor, and every such appeal shall be made within such time and in such form and shall be heard in such manner as shall be prescribed by rules in that behalf to be made under the authority of this Act.

Sects. 5 and 8 of the present Act are—apart from differences of language which, so far as the present question is concerned, are immaterial— B identical with sects. 5 and 8 of the Act of 1919. The change of substantive jurisdiction from a mere report by the Disciplinary Committee and an order by the High Court upon it to an original order by the Disciplinary Committee as a domestic court acting in place of the High Court, with an appeal to the High Court, has created a new position. C To-day every person appealing to the High Court in exercise of his statutory right is a party to the appeal, and, as such, presumably possesses all the natural rights recognised by our system of justice as belonging to every party to litigation, whether in first instance or on appeal, including the right, if so advised, to appear in person, and to argue his D or her own case. No one can doubt that before the committee an applicant is entitled to be heard in person; and, when exercising the right of appeal under sect. 8, the applicant is, in my opinion, in exactly the same position as is any other appellant from an order of a court of first instance. If so, he is free to avail himself of the ordinary English E right of every appellant, if he so chooses, to appear in person to argue his own case. It is not, as a rule, in the interest of the layman to take that course, nor is it helpful to the court. But it is an essential element in the liberty of the subject that he may come in person to the King's Court for redress. For these reasons, I think that the Divisional Court F was wrong in refusing audience to the applicant. Even assuming that she had made an election to be represented by counsel, I think that she was entitled, when counsel failed her, to change her mind, and argue her own case.

Another question was raised before us, however, which is of much G greater importance. Mr. Andrew, on behalf of the Law Society, referred us to *Re A Solicitor* (3), a decision of the Divisional Court, consisting of Lord Hewart, L.C.J., and the late Avory and Swift, JJ., as a reason for dismissing the appeal. In that case, the committee had promulgated their decision in terms which ended with the words:

> H while not finding any professional misconduct the committee make no order as to costs.

The complainant, who was acting on behalf of the Law Society, appealed. The respondent took a preliminary objection that there had been no order, and that no appeal lay except from an order, and the court upheld the objection. In the present case, there was an order, dismissing the application, and the first point taken in the 1934 case does not arise. But in that case the court went on to hold that, even if the refusal to find professional misconduct did amount to an order dismissing the complaint, the wording of sect. 8 of the Act of 1932, conferring the right of appeal, was not so definite as to override the long-established principle that there can be no appeal against an acquittal on a criminal charge. As an illustration of the principle, they relied on *R.* v. *London County Keepers of the Peace & JJ.* (4), a highway case in which the court applied it to the dismissal of a summons for obstructing. WILLS, J., said, at p. 361 :

> I think this is distinctly a criminal matter within the decisions of the Court of Appeal, refusing appeals in cases stated by justices.

In the present case, the Disciplinary Committee purported to be acting, as I have already said, under r. 2 of the Discipline Rules of 1932, made under sect. 6 (1) of the Act, which authorises the dismissal of a complaint without a hearing, and I doubt whether a summary dismissal of an application without a hearing comes within the principle of the above decision of the Divisional Court in 1934. In any event, I feel bound to say that, as at present advised, and without further argument, I am not prepared to concur in that decision. It seems to me to give to the domestic tribunal a final and exclusive jurisdiction, which was not intended by the Act. I think that sect. 8 was intended to preserve an ultimate final jurisdiction of the High Court over its own officers in all cases.

I agree that the appeal must be dismissed, but the dismissal will not, in my judgment, prejudice the right of the appellant again to make an application to the Law Society, if she be so advised, although, as I have already indicated, I cannot see any sufficient grounds of complaint in the affidavit she made.

LUXMOORE, J. : On Oct. 14, 1936, the appellant (hereinafter called the applicant) made an application in writing to the Disciplinary Committee of the Law Society constituted under the Solicitors Act, 1932, s. 4, asking that two solicitors named in the application might be required to answer certain allegations which were ultimately embodied in an affidavit sworn by the applicant on Oct. 17, 1936. This application was made under sect. 5 (1) (*b*) of the same Act. Without communicating with the solicitors, and before fixing any day for the hearing of the application, and in the absence of the applicant, the Disciplinary Committee, on Nov. 5, 1936, considered the application. The conclusions of the committee were subsequently embodied in a document, dated Nov. 5, 1936, signed by the chairman of the committee. The document is entitled : " Findings and Order of the Disciplinary Committee constituted under the Solicitors Act, 1932." The material part of this document is in these terms :

> Upon reading the said affidavit of the applicant sworn Oct. 17, 1936, the committee being of opinion that no *prima facie* case is shown against the said two

solicitors it is ordered that the said application be dismissed without requiring the said two solicitors to answer the said allegations.

On Nov. 11, 1936, the applicant served on the Registrar of the Law Society a notice of motion to be heard in the Divisional Court of the King's Bench Division by way of appeal from the order of the Disciplinary Committee. The order sought by the notice of motion was:

that the above two solicitors shall be required to answer the allegations contained in the affidavit of Oct. 17, 1936, accompanying the application to the Disciplinary Committee and for an order that the Disciplinary Committee shall hear and determine these allegations or that any other order shall be made as the court shall think fit for the determination of these allegations.

The solicitors concerned were not respondents to this notice of motion, the sole respondent was the Registrar of Solicitors. The motion came before the court on four separate occasions. On each of the first three of these, the hearing of the motion was adjourned, owing to the illness of counsel instructed to appear for the applicant. Ultimately, the motion came before the Divisional Court on Feb. 2, 1937, when the court refused any further adjournment. The applicant, who was not then represented by counsel, desired to conduct her appeal in person, but the Divisional Court declined to hear her, on the ground that, in any proceedings in the High Court under sect. 5 of the Act, the applicant must be represented by counsel. The Divisional Court dismissed the appeal, and ordered the applicant to pay the costs of the Registrar of Solicitors. Leave to appeal was refused. On Feb. 16, 1937, the applicant obtained leave from this court to present an appeal from the order of the Divisional Court. The notice of appeal asks for an order that the order of the Divisional Court dated Feb. 2, 1937, may be rescinded or varied, and for an order that the above two solicitors may be required to answer the allegations contained in the affidavit referred to in the notice of appeal to the Divisional Court dated Nov. 11, 1936, and that the Disciplinary Committee constituted under the Solicitors Act, 1932, may hear and determine the allegations, or that any other order may be made for the determination of these allegations. The sole respondent to the notice of motion is the Registrar of Solicitors.

At the hearing in this court, counsel for the applicant in substance confined his argument to the question of whether the applicant was entitled to present her case to the Divisional Court in person, and urged that that court was wrong in refusing to allow her so to do. He asked that the order of the Divisional Court might be set aside, and that the matter should be remitted to that court with directions to hear the motion on its merits. It seems to me, however, that two preliminary questions arise: (i) whether the Disciplinary Committee on Nov. 15, 1936, made an order from which an appeal lies; and (ii) assuming that an appeal lies, is it competent to the applicant to ask for any variation of the order without making the two solicitors parties to the appeal?

To answer these questions, it is necessary to consider the material provisions of the Solicitors Act, 1932, under which the application was made, and the rules relating to any such application. Sect. 5 (1) of the Act provides that any application by another person to require a solicitor to answer allegations contained in an affidavit shall be made to, and heard by, the Disciplinary Committee of the Law Society, constituted under sect. 4 of the Act, in accordance with rules made under sect. 6 of the Act. Sect. 6 provides that the Disciplinary Committee, with the concurrence of the Master of the Rolls, may from time to time make rules for regulating the making, hearing, and determining of applications to the committee under this part of the Act.

The rules made with the concurrence of the Master of the Rolls under sect. 6 are dated July 28, 1932. The material provisions of these rules are as follow:

> 1. An application to the committee . . . to require a solicitor to answer allegations contained in an affidavit shall be in writing under the hand of the applicant in the form set out in the schedule, and shall be sent to the clerk to the committee, together with an affidavit by the applicant, stating the matters of fact on which he relies in support of his application.
>
> 2. Before fixing a day for the hearing the committee may require the applicant to supply such further information and documents relating to the allegations as they think fit, and in any case where, in the opinion of the committee, no *prima facie* case is shown the committee may, without requiring the solicitor to answer the allegations, dismiss the application. If required so to do, either by the applicant or the solicitor, the committee shall make a formal order dismissing such application.
>
> 3. In any case in which, in the opinion of the committee, a *prima facie* case is shown the committee shall fix a day for hearing, and the clerk to the committee shall serve notice thereof on the applicant and on the solicitor, and shall serve on the solicitor a copy of the application and affidavit.

Rules 2 and 3 appear to me to contemplate that the Disciplinary Committee shall first consider whether a *prima facie* case is disclosed by the information and documents relating to a particular application before any date for hearing the application is fixed, and it is only if the committee are satisfied that a *prima facie* case is disclosed that the application is to be allowed to proceed to hearing. This procedure does not appear to me to be in accordance with the provisions of sect. 5 of the Act of 1932, and, in my judgment, r. 2 is *ultra vires* in so far as it provides for the making of an order dismissing an application under the Act without any hearing.

By sect. 3 (2) it is provided that, on the hearing of an application under sect. 3 (1) (*b*), the Disciplinary Committee has power to make any such order as to removing from or striking off the Roll the name of the solicitor to whom the action relates, as to suspending him from practice, as to payment by any party of costs, and otherwise in relation to the case, as they may think fit. This power is in terms directed to what is to be done "on the hearing." It seems to me that a refusal to hear is outside the scope of this section. Sect. 8 of the Act gives a right of appeal against any order made by the Disciplinary Committee under sect. 5. It is in these terms:

> An appeal against any order made by the committee under this part of this Act [which includes sect. 5] shall lie to the High Court at the instance either of the applicant or of the solicitor to whom the application relates, and every such appeal shall be made within such time and in such form and shall be heard in such manner as may be prescribed by rules made from time to time [as therein provided].

The rules made under this section include a provision (see r. 5) that copies of the order appealed from, prefaced by a statement of the finding of the committee, and a copy of the notes of evidence taken on the hearing, and of any affidavits used thereon, shall be furnished. It seems to me to be plain that both the Act and the rules contemplate that the order in respect of which the right of appeal is granted shall be an order made "on the hearing." An order made, in the absence of the parties, on a preliminary consideration by the committee of the question of whether there is a *prima facie* case sufficient to justify a hearing is not, in my judgment, "an order made on a hearing." It is a refusal to hear, and, consequently, there is no order from which the applicant is entitled to appeal under the provisions of sect. 8 of the Act. In my judgment, the applicant's remedy, if any, is in respect of the refusal to hear, and is consequently the subject-matter of mandamus, and not of an appeal. The second question, therefore, does not arise, but, if I had come to a contrary conclusion with regard to the answer to the first question, I am of opinion that it would not be competent for the Divisional Court or for this court to consider the appeal in the absence of the two solicitors, and that, in that view of the case, this appeal would have been defective for want of parties

It is to be observed that neither the Divisional Court nor this court could make an order in the form sought by the notice of motion either by requiring the solicitors to answer the allegations made by the applicant against them or by directing the Disciplinary Committee to hear and determine whether the allegations are well-founded. The only relief which the applicant could obtain would be a direction to the Disciplinary Committee to fix a hearing and to hear her application. This relief was not sought in the proceedings before the Divisional Court, nor in those in this court.

This effectively disposes of the case. Practically the whole of the argument proceeded on the assumption that the appeal was competent, and was directed to the question whether, on an appeal under sect. 8, a complainant against a solicitor can appear in person or must invariably appear by counsel. This point is of importance, and, as it was fully argued in this court, I think it right to deal with it. The Divisional Court decided against the appellant's right to appear in person, on the authority of certain decisions under earlier Acts relating to solicitors. The latest of these decisions is *Re a Solicitor, Ex p. Incorporated Law Society* (1), which came first before the Divisional Court and was subsequently heard in the Court of Appeal. Both courts decided that, in proceedings under the Solicitors Act, 1888, s. 13, the applicant who instigated them could be heard by counsel only when the report of the Disciplinary Committee was brought before the court. In so deciding, each court followed an earlier decision in *Ex p. Pitt* (2). Counsel on behalf of the appellant, in the present case, argued that these decisions have no application to an appeal under sect. 8 of the Act of 1932. Under the Act of 1888, the function of the Disciplinary Committee was to hear the complaint and report to the court, when the court dealt with the complaint in the light of the report and after argument on behalf of the persons interested, that is, the complainant and the solicitor concerned. Under the Act of 1932, the Disciplinary Committee hear the complaint and determine it after hearing the parties to it. Both the applicant A and the solicitor are in express terms given the right of appeal to the High Court from the Disciplinary Committee's order. There is no limitation on this right, and therefore it carries with it the right which is enjoyed by every person entitled to appeal to this court, to appear either by counsel or in person. I am therefore of opinion that, if, contrary B to the opinion I have already expressed, the appeal to the Divisional Court had been competent, the refusal of that court to hear the appellant in person would have been contrary to the provisions of sect. 8 of the Act of 1932. But, as I have already stated, the applicant has not, in my judgment, any right of appeal in the circumstances of this case, and, C further, if, contrary to my opinion, she had such right, the present appeal is defective for want of parties. Consequently, I am of opinion that this appeal must be dismissed, and the appellant ordered to pay the costs of the respondent, the Registrar of Solicitors. It is, I think, right to add that I have read the applicant's affidavit sworn in support D of her application against the two solicitors. I agree that it seems impossible to extract from it any case which the two solicitors could properly be required to answer, but, in my opinion, it cannot be held that the Disciplinary Committee are entitled to refuse to fix a hearing on this ground. E

Appeal dismissed with costs.

Solicitors: *Gassman & Gassman* (for the appellant); *Registrar of Solicitors* (for the respondent).

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*] F

Re CARVILLE, SHONE *v.* WALTHAMSTOW BOROUGH COUNCIL.

[CHANCERY DIVISION (Clauson, J.), **November 16, 17, 1937.**] G

Will—Construction—"Residue to be disposed of as my executors think fit"—Executors hold on trust for persons entitled on a partial intestacy and do not take beneficially.

The testatrix, after giving certain legacies, and after providing for the upkeep of a grave, gave the two executors £100 each, and concluded as follows: "The residue to be disposed of as my executors shall think H fit":—

HELD: the executors did not take the residue beneficially, but in trust for such persons as were, under the Administration of Estates Act, 1925, s. 49, entitled to it upon a partial intestacy.

[EDITORIAL NOTE. Since the Executors Act, 1830, executors can take beneficially only if an intention to that effect is shown in the will. This position was reaffirmed after 1925 in *Re Skeats, Thain* v. *Gibbs*, [1936] 2 All E.R. 298; Digest Supp., and the question here is whether the will shows such an intention.

AS TO EXECUTORS TAKING BENEFICIALLY, see HALSBURY, Hailsham Edn., Vol. 10, pp. 606-610, paras. 886-889, and FOR CASES, see DIGEST, Vol. 23, pp. 469-473, Nos. 5378-5424.]

A Cases referred to:

(1) *Fenton* v. *Nevin* (1893), 31 L.R.Ir. 478.

(2) *Re Maxwell's Will* (1857), 24 Beav. 246; 44 Digest 954, *8072*; 26 L.J.Ch. 854; 30 L.T.O.S. 49.

(3) *Williams* v. *Arkle* (1875), L.R. 7 H.L. 606; 23 Digest 469, *5380*; 45 L.J.Ch. 590; 33 L.T. 187.

B (4) *Re Howell, Re Buckingham, Liggins* v. *Buckingham*, [1915] 1 Ch. 241; 23 Digest 471, *5402*; 84 L.J.Ch. 209; 112 L.T. 188.

(5) *Re Chapman, Hales* v. *A.-G.*, [1922] 2 Ch. 479; 23 Digest 471, *5405*; 91 L.J.Ch. 527; 127 L.T. 616.

(6) *Yeap Cheah Neo* v. *Ong Cheng Neo* (1875), L.R. 6 P.C. 381; 43 Digest 719, *1571*.

C

SUMMONS taken out by the plaintiffs, the executors of the will of Clara Carville, which was proved by them on Apr. 19, 1937, asking the court to determine whether, according to the proper construction of the said will, the plaintiffs are entitled to the residuary estate of the said D testatrix beneficially, or, if not, whether they ought to hold the same in trust for the statutory next-of-kin of the said testatrix, or how otherwise the plaintiffs ought to dispose of the same.

J. M. Gover, K.C., and *Russell Gilbert* for the plaintiffs.

Humphrey H. King for the Walthamstow Borough Council.

E *D. Ll. Jenkins* for the other defendant, claiming a beneficial interest as next-of-kin.

Gover: A gift to A. to be disposed of as he should think proper has been held to be an absolute gift to A., and the terms of a gift to executors should be interpreted in the same way. In the present case, there is F nothing to indicate how they should hold the residue. The main difficulty in my way is that, in the present case, there are two executors. [Counsel referred to *Re Maxwell's Will* (2), *Williams* v. *Arkle* (3), *Re Howell* (4), *Re Chapman, Hales* v. *A.-G.* (5).]

Jenkins: A gift to an executor must be construed in the same way G as a gift to any other person. That cannot mean that one can ignore the fact that the disposition is in favour of the executor. It means that, if the will contains a disposition in favour of the executor, the first problem of construction is whether it is in favour of the executor as such or in favour of the executor as an individual. If the words are sufficient H to carry a beneficial interest for an individual who is not an executor, they will be given the same effect if the individual in question happens also to be an executor. If the gift is to him as an individual, no special words are required to give a beneficial interest. It is reasonably plain that the power of disposition is essentially conferred upon the executors as such. When the executorial functions mentioned in the will have been fulfilled, there is a residue in the hands of the executors, and the testatrix has said that they are to dispose of that residue as they shall think fit. That means that they are to distribute any balance as they think right, and not that any balance of the estate is to be at their own disposal. On the natural construction of the will, the conclusion should be that the testatrix has not disposed of the beneficial interest in the residue, except as a trust to the executors, which trust the court should enforce. Therefore, to that extent, there is an intestacy. [Counsel referred to *Fenton* v. *Nevin* (1), *Re Howell* (4), and *Re Chapman, Hales* v. *A.-G.* (5).]

Gover, in reply : I entirely accept the view that, before an executor can take any part of the assets beneficially, he must show that the testator has given it to him as an individual, and not as executor. In the present case, the question is, what is there to differentiate the matter from a case where the gift was not to executors ? In *Fenton* v. *Nevin* (1), the word " apply " was used, and not the words " dispose of." The word " apply " is not very apt to indicate a beneficial interest. It is a word which connotes a power to use a fund in some way extraneous to the purpose for which the fund is given. The words used in the present case are " dispose of." [Counsel referred to *Yeap Cheah Neo* v. *Ong Cheng Neo* (6).]

CLAUSON, J. : In this case, Dr. Shone and Mr. C. B. Smith, who are the executors of the will of the testatrix, ask for the determination by the court of the question :

> Whether according to the proper construction of the said will the plaintiffs are entitled to the residuary estate of the said testatrix beneficially or if not whether they ought to hold the same in trust for the statutory next-of-kin of the said testatrix or how otherwise they ought to dispose of the same.

There are in the books many cases of some similar claim, and the attention of the court has quite properly been drawn by counsel to a number of these cases.

For myself, I think that the case which is of most assistance is the Irish case of *Fenton* v. *Nevin* (1). In my view, in that case the principles which will guide the court in a matter of this kind are correctly stated. FITZGIBBON, L.J., says, at p. 464 :

> Accordingly, before an executor can take any part of the assets beneficially, he must show that the testator has given it to him as an individual.

With that in mind, I turn to the will, to see whether I can find a gift to show that Dr. Shone and Mr. Smith, who are in fact the executors, are entitled to the residuary estate of the testatrix. The will is one which bears clearly on the face of it the familiar marks which show that it is what is commonly called home-made. The testatrix begins by revoking all wills made by her heretofore. She then appoints Dr. Shone and Mr. Smith her executors, and directs that all her just debts, funeral and testamentary expenses shall be paid as soon as possible. She next gives certain directions to the executors that all her furniture and all her shares are to be sold. Then she proceeds to make a long list of pecuniary bequests to various persons whom she describes by name, each name being followed by mention of the sum given. That is followed by the names of a certain number of charities, followed in each case by the figure of the sum given. She then interposed a gift to an old servant, namely :

A

> Miss Mary E. Miller, if still in my service at the time of my decease £50.

She then resumes the charitable gifts, and mentions more. Each of them is followed by the figure of the sum given. The last of them is one of £100 to the Royal National Lifeboat Institution, and from that point B onwards I propose to read every word of the will. It continues :

> To each of my executors £100, and a suitable sum set apart for the upkeep of the family grave No. 3555A in Walthamstow Cemetery and 10*s*. 6*d*. per annum and 2*s*. 6*d*. attendant for flowers to be planted on said grave and my body to be interred in said grave. The residue to be disposed of as the executors shall think fit.

C Does it appear, on a fair construction of the will as I have read it, that the testatrix has given her residue to Dr. Shone and Mr. Smith as individuals ? In my view, the contrary appears with reasonable plainness. I need not refer again to the clauses about the family grave. What I really have to construe are these words :

D

> To each of my executors £100. The residue to be disposed of as the executors shall think fit.

In order that I should find, on the face of the will, a gift to the executors as individuals, it is, I agree, not necessary to find the actual word " give " or " bequeath," if there is a phrase which, on its clear construction, shows E an intention to confer a beneficial interest. I can find no word from which I can hold that there is any beneficial interest in the residue given to the executors. The words " the residue to be disposed of as the executors shall think fit " seem to me to mean that she will leave the executors to carry out their duties as they shall think fit, without the F testatrix defining the manner in which the distribution is to take place, or the object of the share. In other words, she has failed to make any effective gift of her residue. Accordingly, I must hold that the residue is held in trust by the executors for the persons who take, in the case of partial intestacy, under the provisions of the Administration of Estates G Act, 1925. The executors are not entitled to take beneficially.

Costs of all parties as between solicitor and client out of the estate.

Solicitors : *Frank Budd & Son* (for the plaintiffs and for the defendants, the Walthamstow Borough Council) ; *Mitchells*, Stratford (for the next-of-kin).

H [*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law*.]

KEVORKIAN *v.* BURNEY (No. 2).

[Court of Appeal (Greer, Slesser and Scott, L.JJ.), **November 15, 1937.**]

Practice—Application for security for costs—Plaintiff resident abroad—Subject-matter of action property within the jurisdiction of the court—R.S.C., Ord. 65, *r.* 6.

The plaintiff, who resided abroad, had purchased from the defendant for over £3,000 what was warranted to be an authentic Greek statue of the sixth century B.C. In an action for breach of warranty, wherein it was alleged that the statue was spurious, application was made that the plaintiff should give security for costs. The court had already made an order that the statue, which was deposited with a warehousing company within the jurisdiction of the court, should not be removed without the consent of the defendants or an order of the court:—

Held: as, in the event of the plaintiff being unsuccessful in the action, the value of the statue must be more than any order for costs that could be made against him, there ought to be no order for security for costs.

[**EDITORIAL NOTE.** This case is an exceptional one in that the "property within the jurisdiction" is the subject-matter of the action, and is alleged by the plaintiff to be more or less worthless. As, however, the defendant will only be entitled to his costs upon the failure of the plaintiff to substantiate his allegations, which would mean that the property would then be of considerable value, the order for security is refused. It must also be noted that the property was deposited within the jurisdiction and could not be removed without an order of the court or the consent of the defendant.

As to Security for Costs, see HALSBURY, Hailsham Edn., Vol. 26, pp. 119, 120, para. 237; and for Cases, see DIGEST, Practice, p. 910, Nos. 4507-4516. See YEARLY SUPREME COURT PRACTICE, 1938, p. 1479.]

Cases referred to:

(1) *Ebrard* v. *Gassier* (1884), 28 Ch. D. 232; Digest, Practice, 910, *4511*; 54 L.J.Ch. 441; 52 L.T. 63

(2) *Re Apollinaris Co.'s Trade Marks*, [1891] 1 Ch. 1; Digest, Practice, 910, *4516*; 63 L.T. 502.

(3) *Crozat* v. *Brogden*, [1894] 2 Q.B. 30; Digest, Practice, 909, *4500*; 63 L.J.Q.B. 325; 70 L.T. 522.

(4) *Clarke* v. *Barber* (1890), 6 T.L.R. 256; Digest, Practice, 910, *4514*.

(5) *Re Howe Machine Co., Fontaine's Case* (1889), 41 Ch. D. 118; Digest, Practice, 910, *4513*; 61 L.T. 170.

(6) *Hamburger* v. *Poetting* (1882), 47 L.T. 249; Digest, Practice, 910, *4510*.

(7) *Redfern* v. *Redfern & Herbert* (1890), 63 L.T. 780; Digest, Practice, 910, *4515*.

(8) *Sacker* v. *Bessler & Co.* (1887), 4 T.L.R. 17; Digest, Practice, 910, *4512*.

Appeal from an order of Goddard, J., dated July 27, 1937. The facts are fully set out in the judgment.

W. Arthian Davies for the appellant.

Hon. Quintin M. Hogg for the respondent.

Davies: It is submitted that the fact that the plaintiff is engaged in other litigation is wholly irrelevant. If there is substantial property available in this country, security should not be ordered. [Counsel referred to *Re Apollinaris Co.'s Trade Marks* (2) and *Ebrard* v. *Gassier* (1).] If the plaintiff fails to prove that the statue is a fake, then it is valuable; if not, he wins the action.

Hogg: The plaintiff says that the statue is worthless for purposes of the action, but valuable as security for costs. This argument ignoree the burden of proof, which ought not to be put on the defendant. Ths plaintiff's experts will say there has been a breach of contract, and there will be experts on the other side. If the jury is bewildered, as may well happen, there will be judgment for the defendant with costs, and, in those circumstances, no one would pay a penny for the statue. The fact that other litigation is pending is very relevant, as execution might be levied on the statue before the defendant could obtain possession of it. [Counsel referred to *Re Apollinaris Co.'s Trade Marks* (2), *Crozat* v. *Brogden* (3), *Clarke* v. *Barber* (4), *Re Howe Machine Co., Fontaine's Case* (5), *Hamburger* v. *Poetting* (6), *Redfern* v. *Redfern & Herbert* (7), *Sacker* v. *Bessler & Co.* (8), and *Ebrard* v. *Gassier* (1).]

GREER, L.J.: In this case, the plaintiff is an art dealer carrying on business in New York, and he is therefore subject to the *prima facie* rule that he ought to give security for costs of an action which is brought in this country. The rule is subject to certain exceptions, one being that, if there is in this country property which can reasonably be regarded as available to meet the defendant's right to have his costs paid, then there should be no order for security. As I understand it—I will refer later to the case to which Mr. Hogg has referred—there has never yet come before the court the question as to whether, when the question is whether the property which is the subject-matter of the action is still within the jurisdiction of the court, that property can be regarded and treated by the court as available for the purposes of costs. That, I understand, has never yet come before the court. The general principle has been stated on many occasions, namely, as it was stated by BOWEN, L.J., in *Ebrard* v. *Gassier* (1), at p. 235:

> The plaintiffs being abroad were *prima facie* bound to give security for costs, and if they desired to escape from doing so they were bound to show that they had substantial property in this country, not of a floating, but of a fixed and permanent nature, which would be available in the event of the defendants being entitled to the costs of the action.

In this case, the defendant will be entitled to the costs of the action only if the plaintiff fails. The plaintiff says that he paid by various instalments in francs the equivalent of £3,335 12*s.* 2*d.* for the statue. He says that the statue was warranted to him by the defendant as being of the sixth century B.C., a neat product of Grecian art. It seems to me quite impossible to hold that that statue does not exceed in value any order that could possibly and reasonably be asked for in this case for security for costs, and, therefore, I think that it has been established that, in the event which will entitle the defendant to have costs, the plaintiff will have in this country a statue for which he has paid £3,335 12*s.* 2*d.* It seems to me impossible to say that there will not be available for the defendant's costs property which, in the event of the defendant's success, will be sufficient to meet any order that is likely to be made with regard to his costs.

Dealing with the facts of this case, when there was an application made for an extension of time to appeal from the judge's order, we made an order, and it was ordered :

> that the torso [the statue in question] remain in the custody of the Pall Mall A
> Deposit and Forwarding Co., Ltd., of Carlton Street, Regent Street, London, W.1., until removed by the consent of the defendant's solicitors or under an order of this court.

The statue will remain there unless the defendant himself desires to have it removed out of the jurisdiction of the court, or unless the court B
makes an order to that effect. In my judgment, it is not sufficient to say, as Mr. Hogg has said, that there may be other claims, which would result in a judgment which might put this statue in peril, as being no longer available for the costs in the present case. If that is to be proved, I think it right to say that it ought to be proved by the defendant, who C
is alleging that the property, which is undoubtedly here, will be insufficient to meet the plaintiff's costs. I think that the probabilities are all the other way, and, dealing with the case, as one must, on the laws of probabilities, we must refuse to order security in this case. I gather that the judge himself would have taken that view in the exercise of D
his discretion if he had not taken into his consideration matters which were not really before him, namely, another action in which there might be judgment, and in which, although it is not proved, there might not be available any assets but this statue. For these reasons, I think that the appeal must be allowed with costs.

E

Slesser, L.J. : I agree, and have nothing to add.

Scott, L.J. : I agree.

F

Appeal allowed with costs.

Solicitors : *Cardew Smith & Ross* (for the appellant) ; *Jacobson, Ridley & Co.* (for the respondent).

[*Reported by* E. Fuller Briscoe, Esq., *Barrister-at-Law.*] G

DAVIES *v.* ELMSLIE.

[COURT OF APPEAL (Greer, Slesser and Scott, L.JJ.), **November 23, 1937.**]

Contract—Illegal contract—Future separation of husband and wife—Averment that wife at all times ready to rejoin husband—No evidence of immoral purpose—Public policy.

The defendant, in consideration of the plaintiff persuading her husband to go to New Zealand and/or consenting to forgo the *consortium* of her husband, promised to pay to the plaintiff an allowance of £4 per week until the defendant should pay either the plaintiff's fare to join her husband or her husband's fare back to England. The statement of claim averred that the plaintiff was and always had been ready and willing to join her husband. The husband sailed for New Zealand, and weekly payments were made for a period of about one year, and, upon the defendant then ceasing to make them, the plaintiff sought to enforce the agreement. The defendant pleaded that the agreement was against public policy, and this question was argued as a preliminary point of law :—

HELD : the contract was not void as against public policy. The issue had to be tried upon the facts set out in the statement of claim, and, as it did not appear therefrom that there was anything immoral in the contract, it was not illegal as against public policy ; but it might be otherwise where all the facts were before the court.

Decision of Lewis, J., ([1937] 4 All E.R. 68) *affirmed.*

[**EDITORIAL NOTE.** The contract in this case is said by the Court of Appeal not to be one envisaging the breaking of the *consortium,* but one contemplating that the spouses would remain on the best of terms and be happily united again after a temporary separation. Such an arrangement is not a forgoing of the *consortium,* and no question of illegality arises.

AS TO CONTRACTS PROVIDING FOR FUTURE SEPARATION OF SPOUSES, see HALSBURY, Hailsham Edn., Vol. 7, pp. 157, 158, para. 222 ; and FOR CASES, see DIGEST, Vol. 12, pp. 264, 265, Nos. 2160-2167.]

Cases referred to :

(1) *Fender* v. *Mildmay,* [1937] 3 All E.R. 402 ; Digest Supp. ; 106 L.J.K.B. 641 ; 157 L.T. 340.

(2) *North Western Salt Co., Ltd.* v. *Electrolytic Alkali Co., Ltd.*, [1914] A.C. 461 ; 12 Digest 303, *2496* ; 83 L.J.K.B. 530 ; 110 L.T. 852.

(3) *R.* v. *Creamer,* [1919] 1 K.B. 564 ; 15 Digest 974, *10,898* ; 88 L.J.K.B. 594 ; 120 L.T. 575.

(4) *Pulford* v. *Pulford,* [1923] P. 18 ; 27 Digest 307, *2846* ; 92 L.J.P. 14 ; 128 L.T. 256.

APPEAL from a decision of LEWIS, J., dated Oct. 15, 1937, and reported in [1937] 4 All E.R. 68.

Richard A. Willes for the appellant.

Hon. Sir Reginald Coventry, K.C., and *W. M. Andrew* for the respondent.

Willes : Where a party has so pleaded a contract that the language shows that it must be illegal, then the point can be determined as a preliminary point with advantage to the parties : see *North Western Salt Co., Ltd.* v. *Electrolytic Alkali Co., Ltd.* (2). This document is incapable of being cured ; it cannot be justified by any surrounding circumstances. A lawful separation agreement can be made only where the spouses are separated, or in immediate contemplation of a separation. This contract contains express provisions for suspension of the *consortium*, and is therefore illegal. [Counsel referred to *R.* v. *Creamer* (3) and *Pulford* v. *Pulford* (4).]

Coventry, K.C., was not called on.

Greer, L.J.: This is one of the many illustrations we have had in this court of the futility of ordering an issue which is dependent upon a literal interpretation of every word in the pleading to be decided in advance of the ascertainment of the facts which may be relevant to the consideration of the questions of law. We have been informed that the application was made by Mr. Willes' client, and that it was opposed, and was strongly opposed, by the plaintiff. In my judgment, the order ought never to have been made, but that does not dispose of the matter, because the order has been made, and the judge was bound to deal with the order as it had been made, and to decide the preliminary point which was argued before him; but, as we listened to the very able argument of Mr. Willes, I could not help thinking that we were being taken a long way back, into the Middle Ages, when one had to treat the pleading really as if it were an Act of Parliament, and effect had to be given to each word in the paragraph which was being interpreted.

As I understand para. 2, it really means this: "In or about Jan., 1936, the plaintiff and the defendant entered into an agreement whereby in consideration of the plaintiff persuading her said husband to go to New Zealand . . . the defendant promised to pay to the plaintiff an allowance at the rate of £4 per week until either the defendant should pay the plaintiff's passage to join her said husband in New Zealand or the defendant should pay her said husband's passage back to England."

Now, looked at in that light, apart from the words on which Mr. Willes relies, so far from this being a contract to induce the wife and husband to live separately and apart, and to deprive the husband of the *consortium*, that is to say, deprive the husband of the comfort and society of his wife, and the assistance to which he might be entitled in his household affairs—so far from it being an agreement of that kind, it is an agreement entirely consistent with the two spouses remaining on the very best terms, writing to one another constantly, enjoying the letters that they were writing to one another, and it is not in any sense a contract likely to lead to any form of separation, nor to lead in any way to the loss of the goodwill which ought to exist between husband and wife.

I regard the words on which so much reliance has been placed, "and/or consenting to forgo the *consortium* of her said husband," as being merely the pleader's way of indicating what construction might by some possibility be put upon the agreement which he sets out at length, and not as indicating that the consideration for the promise was the loss of *consortium*. If I had thought that the consideration for the promise was intended to be the consent of the wife to forgo the *consortium* of her husband, the result of this appeal would be quite different; but I do not so read it; and for that reason I think that the judge's conclusion is right, though I think that he found difficulties in the way of that conclusion which it was quite unnecessary for him to consider.

For these reasons, I think that the appeal must be dismissed, with the A usual consequences.

SLESSER, L.J.: I am of the same opinion. By para. 5 of the defence in this case, the issue is raised:

> that the contract alleged and relied upon by the plaintiff and the performance B alleged on her part is founded upon an illegal consideration and contrary to public policy and void.

An attempt is being made in the preliminary point of law to decide that issue raised by that plea.

But the first question which has to be considered is: What is the nature C of the agreement which it is said is founded upon an illegal consideration? When we come to look at the contract as pleaded, and the consideration, we find that in consideration of the plaintiff persuading her husband to go to New Zealand the defendant is to pay the plaintiff an allowance at the rate of £4 a week until the defendant shall pay the plaintiff's D passage to join her husband in New Zealand or the defendant shall pay her husband's passage back to England.

Now, leaving out the debatable words "consenting to forgo the *consortium* of her said husband," that agreement, apart from those words, so far from being an agreement of separation, is an agreement of E physical separation for a period, but contemplates that the parties will remain as husband and wife, and actually provides for the financial means for their once more physically living together. There is in this agreement, as I think Mr. Willes is constrained to admit, nothing in the nature of a separation agreement, either present or future, except F the words "consenting to forgo the *consortium* of her said husband."

As has been pointed out during the argument, the word "*consortium*" is not a word of art. It has been used with increasing frequency of late years; it is difficult to find it in the earlier books. For instance, LORD ATKIN, in the case of *Fender* v. *Mildmay* (1), says, at p. 410:

G

> Not only are the parties not living together, but they are not entitled to require that conjugal rights should be restored. The *consortium* is broken. The petitioning spouse has in effect said, "You have in such a degree violated your marriage obligations that I am proposing to treat myself as free. . . ."

In the same report, LORD THANKERTON is speaking of separation agree-H ments and the like, and he says, at p. 415:

> Such agreements negative the *consortium vitæ*, which is intended, not only to preserve the happiness of the spouses, but also to conserve and further the interests of the children, a very important consideration.

In the present agreement, I can see nothing which satisfies the statement of LORD ATKIN that the *consortium* is broken. There is nothing here to assume that the conjugal rights should not be restored, nor indeed that they have ever been impaired save by such a physical separation as mere economic necessity, or the necessity of a man serving the State, may impose upon every husband. I think it would be in the highest degree technical and improper to give to the words of the pleader "to forgo the *consortium*" a meaning which would make that matter the consideration so that the position was actually that the marital relations should come to an end. I agree with Greer, L.J., that those words are no more than the pleader's description of what he has said was the agreement, namely, a persuading of the husband to go to New Zealand, coupled with a provision that the defendant might at a subsequent time pay the plaintiff's passage to join her husband in New Zealand, or pay the husband's passage back to England.

It follows that, while I agree with the conclusion of the judge that this preliminary point must be decided in favour of the plaintiff, this is not an agreement contrary to public policy. I do not think it necessary to enter into his reasons, nor the elaborate judgment which he has given. He seems to me to have proceeded upon the assumption that this was a separation agreement. He discusses the question of whether the absence of any evidence as to the motives, and the doubt whether the agreement was or was not made in respect of an immediate future separation, would not justify him in coming to the conclusion that he could not say, in the absence of that evidence, that it was contrary to public policy. I will say nothing about the various cases which he discussed, because, in my view, the defendant here fails *in limine* in failing to prove any separation agreement at all.

Scott, L.J.: I agree with the judgments that have been delivered, and desire to add that I do not myself disagree with the judgment of Lewis, J., in regard to the reasons which he has advanced, but express no final opinion upon that aspect, because I prefer the reasons given by Greer and Slesser, L.JJ. I particularly desire to join with Greer, L.J., in the expression of opinion that the habit of dividing actions and attempting to try preliminary issues is in nine cases out of ten most undesirable. It nearly always leads to difficulty and to increased costs. I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *Peacock & Goddard*, agents for *Shakespeare & Vernon*, Birmingham (for the appellant); *Piesse & Sons*, agents for *B. D. J. Hayes*, Shrewsbury (for the respondent).

[*Reported by* E. Fuller Briscoe, Esq., *Barrister-at-Law.*]

TUDOR-HART *v.* BRITISH UNION FOR THE ABOLITION OF VIVISECTION.

[COURT OF APPEAL (Greer, Slesser and Scott, L.JJ.), **October 13, November 22, 1937.**]

A *Practice—Particulars—Libel action—Fair comment—Rolled-up plea—Particulars of facts relied on.*

In answer to a claim for libel, it was pleaded that, in so far as the words complained of were statements of fact, they were true in substance and in fact, and, in so far as they were expressions of opinion, they were fair comment upon the "said facts" which were matters of public interest. An application was made for particulars of the "said facts":—

B HELD: the court was bound by the decision in *Aga Khan* v. *Times Publishing Co.* (3) to hold that the application for such particulars must be disallowed as being a request for evidence.

Aga Khan v. *Times Publishing Co.* (3) *followed and the dictum of* LORD ATKIN *in Hobbs.* v. *People Newspaper Publishing Co., Ltd.* (4) *considered.*

C **[EDITORIAL NOTE.** The effect of granting the application here refused would be to make a party pleading the rolled-up plea state which of the statements are statements of fact and which are comment. The court has held that it has already been decided by the Court of Appeal that such particulars cannot be asked for, and that an *obiter dictum* of LORD ATKIN in the House of Lords is not sufficient to allow the court to reconsider the point. The court, however, expressed the view D that, had the matter been free from authority, they would have inclined to the opposite view.

AS TO THE ROLLED-UP PLEA, see HALSBURY, Hailsham Edn., Vol. 20, pp. 498, 499, para. 611; and FOR CASES, see DIGEST, Vol. 32, pp. 152, 153, Nos. 1844-1849. See also YEARLY SUPREME COURT PRACTICE, 1938, p. 306.]

E Cases referred to:

(1) *Digby* v. *Financial News, Ltd.*, [1907] 1 K.B. 502; 32 Digest 152, *1845*; 76 L.J.K.B. 321; 96 L.T. 172.

(2) *Sutherland* v. *Stopes*, [1925] A.C. 47; 32 Digest 142, *1739*; 94 L.J.K.B. 166; 132 L.T. 550; *revsg.* S.C. (1923), 39 T.L.R. 677.

F (3) *Aga Khan* v. *Times Publishing Co., Dawson* v. *Same*, [1924] 1 K.B. 675; 32 Digest 153, *1847*; 93 L.J.K.B. 361; 130 L.T. 746.

(4) *Hobbs* v. *People Newspaper Publishing Co., Ltd.* (1926), *Times* Newsp., Mar. 30.

(5) *Sturt* v. *Taylor* (1931), Unreported.

APPEAL from an order of DU PARCQ, J., dated July 16, 1937. The G facts are set out in the judgment.

Theobald Mathew for the appellant.

G. O. Slade for the respondent.

Mathew: It is submitted that a party cannot be called upon to give particulars of the facts in a rolled-up plea: *Aga Khan* v. *Times Publishing Co.* (3). There are no special facts in this case to take it out of H that case.

Slade: If the *Aga Khan* case (3) goes beyond saying that particulars must not usurp the functions of the judge or the jury, then it is bad law: *Hobbs* v. *People Newspaper Publishing Co., Ltd.* (4); *Sturt* v. *Taylor* (5). If the facts in a libel case are insufficiently particularised, there is nothing in the *Aga Khan* case (3) to prevent particulars from being ordered.

Mathew, in reply.

GREER, L.J. [delivering the judgment of the court]: This is an appeal from the order of the judge in chambers, whereby he reversed A an order made by the master and referred the matter to the master, with a direction that the plaintiff (who is defendant to a counterclaim for damages for libel) is to give to the defendants full particulars of the allegations contained in the libel alleged in the counterclaim, which are intended to be comprised in the expression " the said facts " in para. 7 B of the reply. The plaintiff by his counsel asks this court to decide that the order of the judge should be reversed, and the order of the master restored, on the ground that the order made by the judge is contrary to a well-established rule of law. It seems desirable that we should state in some detail how the question involved in this appeal has arisen. C

The plaintiff brought an action for libel against the British Union for the Abolition of Vivisection, and named members of the committee, the secretary of the Union, and the printers of the alleged libel. The defendant Union and the defendants Long, Hill, and Kidd, delivered a defence and counterclaim. By their counterclaim, they claimed D against the defendant (that is to say, the plaintiff in the action) damages for libel. By his reply, the plaintiff, *inter alia*, pleaded what has become known as the rolled-up plea of fair comment. This plea is in the words following:

E

> Further or alternatively insofar as the said words complained of in para. 11 (*a*) and (*b*) are statements of fact, they are true in substance and in fact, and in so far as they are expressions of opinion, they are fair comment upon the said facts which are a matter of public interest.

On May 21, 1937, the said defendants asked for certain particulars of the allegations relied on to prove certain specified statements contained F in the alleged libel. In our judgment, the master's order was right, and the judge's order was contrary to a well-established rule of law, and, even if we thought that the rule so established produces a result that is neither reasonable nor just, we are still bound to follow a rule of law established by decisions of this court and of the House of Lords. In G our judgment, this court ought to hold itself bound by the opinion expressed by LORD COLLINS, M.R., in *Digby* v. *Financial News, Ltd.* (1), by that expressed by LORD SHAW and LORD CARSON in *Sutherland* v. *Stopes* (2), and by the decision of the Court of Appeal in *Aga Khan* v. *Times Publishing Co.* (3). We think we are bound, by the decision of H the Court of Appeal in the *Aga Khan* case (3), to hold (i) that a defendant pleading the rolled-up plea cannot be ordered to deliver particulars stating which of the statements in the words complained of the defendant relies on as statements of fact, and which as being expressions of opinion; (ii) that the court cannot order such defendant to give particulars of the facts he relies on as being the basis of his comments, if the plea limits those facts to the said facts.

In our judgment, the questions in this appeal have been determined adversely to the respondents in the *Aga Khan* case (3), and the appeal must be allowed.

Mr. Slade, for the respondents, relied on an expression of opinion by Lord Atkin in *Hobbs* v. *People Newspaper Publishing Co., Ltd.* (4), a case which is reported in the *Times* newspaper of Mar. 30, 1926, only. In the course of the argument, Lord Atkin, then Atkin, L.J., said :

> Assume it was said that a man was a murderer and ought not to be a member of a decent profession, that fair comment was pleaded in the public interest, and that it was then said : " I am going to trial and not going to give you any particulars. He is a murderer, and at the trial I will prove this," that would be monstrous.

In that case, the only order made by the court was that the appeal be adjourned *sine die* to enable the defendant to amend the statement of defence. The view stated by Lord Atkin during the argument was an *obiter dictum*, but in all probability one to which, if he had to give judgment, he might not have adhered. If the question we have to determine here were free from authority, the inclination of our minds would be in the same direction as that indicated by Scrutton, L.J., in his judgment in the *Aga Khan* case (3), and by the proposition implied in the words of Lord Atkin above quoted, but we are clearly of opinion that this court is bound by authority to hold that the order appealed from was wrongly made, and must be reversed.

We think that the application for particulars was objectionable, as it took the form of a request for evidence such as met with the disapproval of Bankes, L.J., in the *Aga Khan* case (3), at p. 681, and with that of Sargant, L.J., at p. 684.

The order will be that the order of the judge in chambers be reversed, that the order of the master be restored, and that the respondents pay the costs here and below.

Leave to appeal to the House of Lords refused.

Solicitors : *Deacon & Co.* (for the appellant) ; *Underwood, Barron & Co.* (for the respondent).

[*Reported by* E. Fuller Briscoe, Esq., *Barrister-at-Law.*]

MURRAY *v.* REDPATH, BROWN & CO., LTD.

[Court of Appeal (Sir Wilfrid Greene, M.R., Romer and MacKinnon, L.JJ.), **November 18, 19, 1937.**]

County Courts—Costs—Scale items—Fees beyond maxima given in scale—Power of registrar on taxation and of judge on review—Limitation to maxima—C.C.R., 1936, *Ord.* 47.

In the taxation of costs in an action in the county court the registrar taxed the items for instructions for brief and for counsel's fee respectively at £6 6*s.* and £8 8*s.*, being the maximum figures appearing in the relevant scale. Upon a review of this taxation the judge allowed a fee of £21 for the first item and £10 10*s.* for the second :—

Held : (i) under the County Court Rules, 1936, Ord. 47, the registrar is bound by the maxima given in the appropriate scale, nor has the judge under r. 42 of that order any power to exceed those maxima. The two sums allowed by the judge should therefore be decreased to the amounts allowed by the registrar, which were the respective maxima.

(ii) under C.C.R., Ord. 47, r. 21, there is a power for the judge, which must be exercised at the hearing, to increase counsel's fee beyond the scale maximum, and a somewhat similar power in respect of expert witnesses under C.C.R., Ord. 47, r. 30.

[**EDITORIAL NOTE.** Under the old rules in force before 1937, the registrar and the county court judge on review had a discretionary power to increase the fees allowed for items in the scales beyond the maxima laid down. In the new rules of 1936 these maxima have been increased, and this discretion is not repeated. Both the registrar and the judge are bound by the maxima on taxation, but there is a discretionary power in the judge exercisable only at the hearing to allow a higher fee to counsel. It was argued that C.C.R., Ord. 47, r. 42 (3), which provides that upon the review of taxation the judge may make such order as may be just, gave a power to allow a higher fee than the maximum, but the Court of Appeal have decided that that rule gives the judge no power to go beyond the maximum or below the minimum fixed by the scale.

As to Taxation of Costs in County Courts, see HALSBURY, Hailsham Edn., Vol. 8, pp. 370, 371, para. 795, and p. 373, para. 802 ; and for Cases, see DIGEST, Vol. 13, pp. 523, 524, Nos. 728-743. See NEW COUNTY COURT PRACTICE, p. 693, and pp. 709, 710.]

Appeal by the defendants from a judgment of His Honour Judge Dumas, given on Mar. 23, 1937, at the Westminster County Court.

R. Marven Everett for the appellant.

R. Monier-Williams and *Brian Clapham* for the respondents.

Sir Wilfrid Greene, M.R. : This appeal raises a question as to the taxation of costs under the new County Court Rules.

The action was an action brought under the Employers Liability Act, and a substantial sum of damages was recovered. When the taxation of the costs took place, questions arose as to two items, instructions for brief and counsel's brief fee. The registrar, who is the taxing officer, held himself to be bound by the maximum figure appearing in the relevant scale, and accordingly the sums that he allowed in respect of those two items were £6 6*s.* for instructions for brief and £8 8*s.* for counsel's fee, those being the maximum figures which appear in the scale. The scale in question was Scale C, and the item for instructions for brief is item 14, which provides for an allowance of £1 1*s.* to £6 6*s.*—those are the limits—and, in the case of counsel's fee, the item is number 67, where the limits are £3 3*s.* to £8 8*s.* The figures that were carried in on the bill were £26 5*s.* for instructions for brief, and £11 11*s.* for counsel's fee. The plaintiffs then applied to the judge for a review, and the judge A increased those fees to £21 for instructions for brief and £10 10*s.* for counsel's fee. He did so, not on the basis that he was interfering with any discretion as to quantum exercised by the registrar, but upon the basis that the judge has, under the rules, a discretionary power to exceed the limits mentioned in the scale. The judge gave leave to appeal, and B the matter comes to this court.

The County Court Rules, 1936, came into force on Jan. 1, 1937. Therefore under C.C.R., Ord. 50, r. 2, the new rules apply, so far as practicable, to the case. That rule says:

> These rules shall apply so far as practicable to any proceedings pending in a county C court on the day on which these rules come into force . . . .

The judge took the view that the rules did apply, and it has not been argued before us that they do not apply, and indeed I can see no reason why they should not apply. There is nothing to make their application impracticable.

D The rules which were in force before Jan. 1, 1937, provided for scales of costs which were in general to be adhered to, but, under those rules, there were provisions by which the scale maximum could be exceeded. For instance, under C.C.R., Ord. 53, r. 8 (2), a discretion was given to the registrar, as the taxing officer, to increase the amounts allowed in cases E of taxation under Columns B and C by a reasonable amount. Rule 23 laid down the principles upon which the discretion should be exercised, and there was a provision for review by the judge.

That, I think, is all that I need refer to in the earlier rules. The principle of them, therefore, was a range of costs within a minimum and a F maximum laid down in the scale, with discretionary power in the registrar to allow a higher sum. It is perhaps worth noticing, with regard to the two items in question in this appeal, that the maximum for instructions for brief under Column C under those rules was £3 3*s.*, and the maximum for counsel's fee under Column C was £5 5*s.* The maxima, G therefore, with regard to those items, and indeed with regard to other items in the scales, have been put up substantially under the new rules.

Under the new rules, a different system is adopted, because the discretionary power to increase the figure mentioned in the scale has been taken away. The costs order under the present rules is C.C.R., Ord. 47, H which provides:

> Rule 1. Subject to the provisions of any act or rule, the costs of proceedings in a county court shall be in the discretion of the court.
>
> Rule 2. The scale of costs in Appendix B shall have effect for the purpose of regulating the costs of proceedings in a county court subject to and in accordance with the rules of this order and the directions contained in the scales of costs.
>
> Rule 3. The registrar shall be the taxing officer of the court of which he is registrar.

Then r. 5 provides for a lower scale and three higher scales A, B and C. Rule 13 provides for power in the judge, if he so certifies, to award costs on such scale as he thinks fit where the question in dispute was of importance to a class or body of persons, or involved a difficult question of law, or where the decision of the court affects issues between the parties beyond those directly involved in the proceedings. That discretionary A
power is not a power to increase the figures mentioned in the scale, but is a power to award costs, in an appropriate case, on a scale which would not, in the ordinary way, have been the scale applicable to those proceedings. Under r. 21, there is an express power to the judge, which must be exercised at the hearing, to certify for an increased fee for B
counsel. It says:

> If in any particular case the judge is satisfied that the fee for counsel ought not to be limited to the amount appearing in the scale and certifies to that effect at the hearing, the fee to be allowed on taxation shall be such larger sum as the registrar thinks reasonable.

Accordingly, there is a power in that case to exceed the scale amount in C
respect of that particular item. Then r. 24 says:

> Subject to r. 23 of this order, no item shall be allowed on taxation between party and party which is not contained in the scales.

Rule 30 provides:

> (1) Where a person attends the court to give in evidence his opinion as an expert D
> witness, he may be allowed a fee for attending the court, and, in addition if allowed by the judge or registrar, a fee for qualifying to give evidence. (2) The fee for qualifying to give evidence shall be such sum as the registrar thinks reasonable, not being more than £3 3*s.*, and the fee for attending the court shall be such sum as the registrar thinks reasonable, not being more than £8 8*s.* nor less than the sum appearing in Appendix C as compensation for loss of time for a person of the class to which the expert witness belongs: Provided that if in any particular case the E
> judge is satisfied that the fee for qualifying to give evidence or attending the court ought not to be so limited, the fee shall be such sum as the judge directs.

That, therefore, is a case where special provision is made for fees not prescribed in the scale. The normal maximum is laid down, but there is a power in the judge to allow a higher sum.

The only other rule to which I need refer is r. 42, which is really the F
rule upon which the argument was based in this case. It says:

> (1) Any party dissatisfied with the taxation of any costs by the registrar may apply for a review of the taxation by the judge.

Then sub-rule (2) provides for the time in which the application is to be made and so forth. Sub-rule (3) says: G

> On the hearing of the application the judge may make such order as may be just.

Leaving that rule aside for a moment, it is clear that, in the new rules, the old discretion which existed in the registrar, to depart from the maxima laid down in the scales, has disappeared, and the only H
elements of elasticity in the present system are to be found in those cases where there is an express power given to exceed the stated maximum. One of those cases is the case of counsel's fee which I have mentioned, where a special certificate is required at the hearing, and the other one is the case of expert witnesses.

It appears to me quite clear that there is no general discretion in the registrar to allow a fee beyond the fees laid down in the scales. I apprehend that, when the sums allowed were increased, as they have been increased certainly in the cases that we are dealing with, and I doubt not in other cases too, it was thought that there was now a suffi-
A ciently wide range within which the registrar could exercise his discretion, and that there was no necessity to give him that further discretion to exceed the specified maxima. In any case, whatever the reason may have been, no such discretion is now given to him.

Then it is said that r. 42 gives a power to the judge on review to do
B something which the registrar could not have done. That argument is based on the language of sub-rule (3), which I will read again:

> On the hearing of the application the judge may make such order as may be just.

It is said that that gives a general discretion in the judge to allow such
C fees and costs as he thinks proper, irrespective of the maxima laid down in the scale.

That is an argument which I am quite unable to accept. Rule 42 is a rule dealing with a review of taxation, and, in my opinion, upon such a review, the judge is just as much bound by the figures in the scales
D as was the registrar himself. The review would, of course, be conducted according to the ordinary principles upon which reviews of taxation are conducted, but the upward limit and the downward limit are prescribed by the scales, and the judge has no power, on such a review, to go outside them. That that construction of r. 42 is the correct one is made
E quite clear, if any further proof of its correctness were needed, by an examination of the old r. 49, which was the rule providing for reviews under the old rules. C.C.R., Ord. 53, r. 49, provided that any party who might be dissatisfied with the allowance or disallowance by the registrar of any item or part of an item of any costs taxed by him might apply to
F the judge for review, and the judge might, upon such application, make such order as he might think just as to the application of the costs thereof.

It is to be noticed that the power to the judge there to make such order as he might think just is precisely the same power as that given
G in the existing r. 42 (3), and, just as, under the old rules, that power in the judge did not entitle him to do something outside the limits laid down by those rules, so, in the present case, r. 42 gives him no such power. The appeal originally was, as I have said, concerned with those items which I have mentioned, but only one of them is in fact pressed before
H us. That is the one relating to the instructions for brief. The respondent does not contest the appeal so far as regards counsel's fee, because the view is taken, and is, I think, correctly taken, on his behalf that, under r. 21, in the absence of a certificate given at the hearing by the judge, the fee could not be increased. Therefore, the appeal really is concerned only with the instructions for brief.

In my opinion, as I have said, the appeal is successful, because the judge, in increasing the fees, purported to exercise a power which he had not got. The result, therefore, is that the item for instructions for brief must be reduced to the amount allowed by the registrar, and that the item for counsel's fee again must be reduced to that figure.

A

Romer, L.J.: I can well understand the desire of the judge to increase the maximum fee allowed by the rules for instructions for brief, because it is plain, I think, that in this case the maximum fee fixed by the scale would provide wholly inadequate remuneration for the solicitor for the work that he has done in that respect; but I, too, have come to B the conclusion, though with great regret, that the judge had no power so to increase the fee.

The only rule really upon which the respondent can rely in support of the judge's decision is r. 42, which, as Sir Wilfrid Greene, M.R., has pointed out, provides that, on the hearing of the application to review C a taxation, the judge may make such order as may be just. In my opinion, that rule does not enable the judge in this case to increase the fee allowed by the schedule for instructions for brief. The rules fix the remuneration on a scale which the framers of the rules presumably thought was just. As Sir Wilfrid Greene, M.R., has pointed out, D there are two rules in which, in the first place, power is given to the judge to allow remuneration to a counsel or to an expert witness in excess of the sums which are fixed by the schedule to the rule.

In those circumstances, it appears to me hopeless to suppose that the framers of the rules intended that, on the hearing of a summons to review E taxation, the judge should have a discretion to allow, not a remuneration which the framers of the rules thought just, but such remuneration as he, the judge, thinks should be allowed. In my opinion, all that r. 42 means is that, on the hearing of a summons to review taxation, the judge may make an order that he thinks just, having regard to the rules. F I agree, therefore, that the appeal must be allowed.

MacKinnon, L.J.: I agree. I understand that the registrar would be anxious to increase this item of allowance for instructions for brief if he had not thought himself constrained to refuse to go beyond the G £6 6*s*. fixed by Scale C. The judge thought that the amount ought to be £21, and, if it were open to me, as he thought it was open to him, to fix what sum was right, I should entirely agree with the judge.

The terms of the rules made under the Act of 1934 now appear to be perfectly clear. Whether such a case as this was foreseen by those who H drafted the rule it is not for me to speculate, but it is not without materiality, I think, to recollect that this was a claim under the Employers Liability Act, 1880, and any action under that enactment must be brought in a county court. In this case, the claim was concerned with the death of a workman through some disaster to a derrick. It resulted in a judgment of £400 for the widow, £80 for one daughter, and £120 for another daughter, £600 in all. It is apparent, from the description in the bill of the work done by the solicitors, that their task of getting up the case, which covered the item instructions for brief, was obviously as considerable and as important as in the case in many High Court actions.

The Scale under C.C.R., Ord. 47, r. 5, is threefold, A, B and C. Scale A applies to amounts recovered between £10 and £20; Scale B applies to amounts recovered between £20 and £50; Scale C applies to amounts recovered over £50. Under Scale B, the allowance for instructions for brief is 10*s.* to £3 3*s.*; under Scale C it is £3 3*s.* to £6 6*s.* Now, the client can get £6 6*s.* if the amount recovered is £51 or £52, but he could equally get only £6 6*s.* if the amount is, as in this case, £600. As I say, I should be glad if the Act and the rules allowed us to affirm the decision of the judge. Though I think that, from the point of view of fairness and reasonableness, it was a very proper view to take, I agree that we cannot do it, and that £6 6*s.* is fixed by this rule as the maximum allowance that can ever be permitted on this item of remuneration to solicitors for their work in any case in a county court.

Appeal allowed.

Solicitors: *Carpenters* (for the appellant); *Shaen, Roscoe, Massey & Co.* (for the respondents).

[*Reported by* Reginald Townsend, Esq., *Barrister-at-Law.*]

HOLDEN *v.* HOWARD.

[Court of Appeal (Sir Wilfrid Greene, M.R., Romer and MacKinnon, L.JJ.), **November 18, 1937.**]

Landlord and Tenant—Rent restriction—Decontrol—Controlled rooms in a dwelling-house—Occupation by a trespasser—Subsequent letting to the trespasser—Whether landlord has regained actual possession—Rent and Mortgage Interest Restrictions Act, 1923 (c. 32), *s.* 2 (1).

The tenant of a controlled dwelling-house died in 1931. She had occupied two rooms and sublet the other three rooms of the house to the defendant. Upon her death the defendant took possession of the whole house, becoming a trespasser in respect of the two rooms. The landlord, upon discovering him in occupation, offered to let him all the rooms he was occupying, and this offer was accepted:—

Held: on these facts the landlord had never regained actual possession of these two rooms, and they were therefore still controlled. A landlord cannot claim possession through a trespasser.

[EDITORIAL NOTE. It is necessary for the decontrol of premises for the landlord to secure actual possession thereof. If a trespasser is in possession, that is not the possession of the landlord for the purposes of decontrol, and in such a case there is no decontrol. It is otherwise where a servant of the landlord is in possession rent-free.

As to Decontrol, see HALSBURY, Hailsham Edn., Vol. 20, pp. 319, 320, para. 379; and for Cases, see DIGEST, Vol. 31, pp. 585, 586, Nos. 7353-7358.]

Cases referred to:

(1) *Goudge* v. *Broughton, Lloyd* v. *Cook, Simson* v. *Miatt, Bartram* v. *Brown, Barker* v. *Hutson*, [1929] 1 K.B. 103; Digest Supp.; 97 L.J.K.B. 657; 139 L.T. 452.

(2) *Remon* v. *City of London Real Property Co.*, [1921] 1 K.B. 49; 31 Digest 556, *7032*; 89 L.J.K.B. 1105; 123 L.T. 617.

A

APPEAL by the defendant from a judgment of DEPUTY JUDGE REES given at the Lambeth County Court on Mar. 22, 1937. The facts are stated in the judgment of SIR WILFRID GREENE, M.R.

Hon. Edward Duke for the appellant.

J. Scott Henderson for the respondent.

B

SIR WILFRID GREENE, M.R.: The only point that arises on this appeal is a very short one, depending on the true construction of the Rent and Mortgage Interest Restrictions Act, 1923, s. 2, as applied to the facts of the case. The appeal relates to two rooms in a dwelling-house at Walworth. C The county court judge held that the other rooms, possession of which was claimed in the action, were still subject to the Rent Restriction Acts. But he also held that the two rooms in question were not so subject, and accordingly made an order for the possession of those rooms, and an order for the payment of arrears of rent and mesne profits. D The facts are very short. The whole house was held by a Mrs. French as tenant. The defendant had occupied two rooms, and, later on, three rooms, in the house. In 1931, Mrs. French died, and the defendant took possession of her two rooms. When he first did so, it appears that he had no title to go into possession of the rooms at all. When the landlord's E agent called later on, presumably to collect the rent, he said that the defendant was a trespasser, and offered him all the rooms—the rooms he was occupying before plus these two—at a rent of 22*s*. 6*d*. a week, and that offer was accepted.

On these facts, the question arises whether those two rooms became F subject to the provisions of the Rent and Mortgage Interest Restrictions Act, 1923, s. 2 (1), which provides as follows:

> Where the landlord of a dwelling-house to which the principal Act applied is in possession of the whole of the dwelling-house at the passing of this Act, or comes into possession of the whole of the dwelling-house at any time after the passing of this Act, then from and after the passing of this Act, or from and after the date G when the landlord subsequently comes into possession, as the case may be, the principal Act shall cease to apply to the dwelling-house.

The question, therefore, is whether, subsequent to the passing of the Act, the landlord came into possession of these two rooms within the meaning of sect. 2 (1). Sect. 2 (3) contains the following definition of H the expression "possession":

> For the purposes of this section, the expression "possession" shall be construed as meaning "actual possession," and a landlord shall not be deemed to have come into possession by reason only of a change of tenancy made with his consent.

I should have thought that the words "actual possession" meant the actual taking of possession by the landlord by his entering himself or by his agent, and that the language of the definition clause was used for the purpose of excluding altogether such things as possession through the receipt of rent, or things of that kind. In the present case the position was this. When Mrs. French died and the defendant took possession of the two rooms, he was there no doubt as a trespasser. A But that did not alter the fact that he had possession of the rooms and that the landlord had not. It is a misconception to treat a landlord, who is excluded from possession by a trespasser, as being himself in possession. He is not. His proper method of procedure, if he wants to eject the trespasser, is to proceed against him for recovery of possession. B That is the strict view of the matter. It is quite incorrect to suggest that the possession of a trespasser is the possession of the true owner, or the person entitled to possession. I cannot myself read the words "actual possession" in sect. 2 (3) as being intended to produce the result that a landlord can be in possession through a trespasser.

C After the arrangement was made with regard to the rent of 22*s.* 6*d.* a week, the relationship became that of landlord and tenant. But there was no point of time in the whole of this relevant period at which the landlord came into actual possession of these two rooms. The county court judge held that the defendant, having entered into occu- D pation of the rooms without any consent, and not under any agreement, was a trespasser in respect of the two rooms. It may well be that, on the death of Mrs. French, the plaintiff became entitled to possession, but that is not sufficient, according to the terms of the section. He must take actual possession, which he never did. The case that was opened E to us and relied upon on behalf of the respondent was *Goudge* v. *Broughton* (1), one of a group of cases decided by the Court of Appeal at that time. The particular words that are relied upon are those of SCRUTTON, L.J., at p. 129. The case was one where the plaintiff had bought a cottage in Oct., 1925, after the passing of the Act of 1923. The cottage had been F in the occupation of the gardener of the plaintiff's vendor, and of course the possession of this gardener, who was not paying any rent, was the possession of his employer. The result of that was that the plaintiff's predecessor in title had, down to Oct., 1925, been in actual possession of the cottage. After the plaintiff bought it, he allowed the gardener to G remain on without paying any rent, and the gardener remained on until Dec., 1926, when the plaintiff got rid of him—I suppose that that means that he secured his departure—and made a letting to Mrs. Broughton. Afterwards, when an attempt was made to recover possession against her, she set up a defence under the Rent Restriction Acts.

H On those facts, the first thing to notice is that the predecessor in title of the plaintiff had unquestionably been in actual possession subsequent to the date of the passing of the Act, because the possession of the gardener was his master's possession. But, when the plaintiff purchased, the relationship no doubt changed, and became that of tenant-at-will. The fact remains, however, that there was a possession of the previous

owner. The real point on which the case appears to have turned was that the plaintiff had been in actual possession, and the Court of Appeal negatived the argument that had found favour with the Divisional Court, which was to the effect that there never was a landlord according to the true construction of the section. The observations of Scrutton, L.J., were directed to that. He recalled some observations of his own A
when he said, at p. 130 :

> In *Remon's* case (2) I said, and I think it has been accepted, that the decision as to statutory tenants only applies to cases where there was a previous legal letting and legal tenancy and does not extend to caretakers, occupiers by service, and mere trespassers.

B

At first sight it would look as though those observations were intended to suggest that, for the purposes of sect. 2 of the Act of 1923, the landlord must always be treated as being in possession, notwithstanding the fact that a trespasser may be in actual possession of the premises. I do not think that, when the context is examined, Scrutton, L.J., intended C
to say anything of the sort. When *Remon's* case (2) is looked at, I think it will be seen that the judge's observations were directed to the question whether a statutory tenancy could be created at all where the relationship between the alleged landlord and the alleged tenant was the relationship of owner and caretaker, who was there on the footing of D
service, or owner and trespasser. That seems to me to be a point quite remote from the one that we have to deal with here. But, if I am wrong in so interpreting the observations, I should like to say that the observation with regard to trespassers, if it was intended to suggest that a landlord has possession through a trespasser, must have crept in, I cannot E
help thinking, through some inadvertence, the point not being before the court. It is to be observed, also, that it is the only dictum which is not repeated in either of the other judgments.

I am of the opinion that, on the true construction of the section, the possession of a trespasser is not the possession of the landlord for the F
purposes of the section, and accordingly I think that the county court judge was wrong in finding that these two rooms had lost the protection of the Acts.

Romer, L.J. : I agree. The only difficulty in this case is occasioned by that passage in the judgment of Scrutton, L.J., in *Goudge* v. *Broughton* G
(1), to which Sir Wilfrid Greene, M.R., has referred. There is in that passage a reference to trespassers, and it is not at all plain what Scrutton, L.J., intended by them, but it is perfectly plain that he could never have intended to hold that possession of land by a trespasser was the possession of the true owner of the land. I agree that the appeal must be allowed. H

MacKinnon, L.J. : I agree.

Sir Wilfrid Greene, M.R. : We must discharge the whole order, including that part which deals with the payment of arrears of rent and mesne profits, and the case must go back to the county court to ascertain, on the basis of our decision, what is the proper sum for the defendant to pay. The appeal is allowed with costs.

Solicitors: *R. C. Monty Hellier* (for the appellant); *Simon, Haynes, Barlas & Ireland* (for the respondent).

A [*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

SPILSBURY (INSPECTOR OF TAXES) *v.* SPOFFORTH.

B [KING'S BENCH DIVISION (Finlay, J.), **June 15, 1937.**]

Income Tax—Maintenance to be paid free of tax—Certificate given for deduction of tax—Maintenance payments allowed as deduction against income—Right of divorced woman to repayment.

The respondent obtained a decree absolute of divorce and an order
C for the payment of maintenance free of tax. At the end of the tax year she obtained a certificate that tax had been deducted and claimed repayment of the tax. The payments had in fact been allowed as deductions against the income of the divorced husband, being treated as a charge on his income:—

HELD: the respondent was entitled to the repayment claimed.

D **[EDITORIAL NOTE.** In this case a conflict arises between the fact that a payment "free of tax" is in reality a payment of a gross sum less the tax which is notionally deducted and the fact that such payment in the case of maintenance is treated as a charge upon the payer's income and allowed as a deduction therefrom. The court has considered itself bound by authority to hold that, the payee being a person whose income is not high enough to attract taxation, she is
E entitled to repayment of the tax which the payments "free of tax" must have suffered by deduction.

AS TO ALIMONY AND MAINTENANCE PAYMENTS, see HALSBURY, Hailsham Edn., Vol. 17, p. 264, para. 530; and FOR CASES, see DIGEST, Vol. 28, pp. 67-69, Nos. 351-367.]

Cases referred to:

F (1) *Re Pettit, Le Fevre* v. *Pettit,* [1922] 2 Ch. 765; 39 Digest 167, *587*; 91 L.J. Ch. 732; 127 L.T. 491.

(2) *Dayrell-Steyning* v. *Dayrell-Steyning,* [1922] P. 280; 28 Digest 68, *354*; 91 L.J.P. 210; 127 L.T. 846.

CASE STATED by the commissioners for the general purposes of the
G income tax under the Income Tax Act, 1918, s. 149, for the opinion of the High Court.

The respondent claimed the repayment of income tax amounting to £29 0*s.* 8*d.* in respect of the period June 5, 1934, to Apr. 5, 1935. The respondent obtained a decree absolute of divorce on June 5, 1934, and
H the husband was ordered to pay maintenance at the rate of £120 per annum free of tax during the joint lives of himself and the respondent, the said sum to be payable monthly, i.e., at the rate of £10 per month. Ten such monthly payments were duly made in respect of the period ending Apr. 5, 1935. The husband then gave the respondent a certificate that he had deducted tax to the amount of £29 0*s.* 8*d.* This amount

was arrived at by "grossing up" the net payments of £10 per month. The husband had, however, been given relief in respect of these payments, the maintenance being treated as a charge upon his income and allowed as deductions in arriving at his income tax liability. The respondent claimed repayment according to the certificate, as having suffered tax by deduction. It was contended against her that the order for maintenance A had been drawn up on the principles laid down in *Dayrell-Steyning* v. *Dayrell-Steyning* (2), and that the payments had not borne tax in the hands of the respondent and no repayment was due. The commissioners held that these were payments free of tax, and that, by the decisions of the court, they were bound to allow the claim for repayment. The B inspector of taxes appealed.

The Attorney-General (*Sir Donald Somervell, K.C.*,) and *Reginald P. Hills* for the appellant.

Cyril King, K.C., for the respondent.

C

Finlay, J.: I need say hardly anything in this case, having regard to the fact that the Attorney-General, who has presented the case very fairly, has conceded here that he cannot properly argue that the conclusion arrived at by the commissioners was wrong. The subject, as a matter of fact, is rather a confusing one. There have been a good many D cases on it, and sometimes the cases have not been easy to understand. My attention was called on the general question to the valuable decision of Romer, L.J. (then Romer, J.), in the case of *Re Pettit, Le Fevre* v. *Pettit* (1). The matter, apparently, has its origin, so to speak, in a decision which was given by Sir Henry Duke, P., in a case of *Dayrell-Steyning* v. *Dayrell-Steyning* (2). E In that case, Sir Henry Duke, P., laid down the general principle which he directed should be considered in arriving at income for the purposes of alimony. The only observation, with the utmost respect, to be made about that judgment is that he does not appear to have had quite present to his mind the difficulty F which arises by reason of the fact that, if one-third of a man's income is to be paid away by way of alimony to his wife, that is, of course, a charge upon his income, and considerable difficulties, I think, therefore, arise in working out the figures. It is not quite so simple as it might be supposed, because the total of the King's taxes, as Sir Henry Duke, G P., said, to be deducted from the income quite obviously depends, not merely upon the total of the income, but also upon charges on the income, and that matter, possibly, with the utmost respect, was not quite present to the mind of Sir Henry Duke, P. At all events, he did not deal with that matter. H

But now, coming to this particular case, the appeal was by a lady, a Mrs. Spofforth, and she had obtained a decree of divorce, and an order had been made by the Divorce Division which said that:

> as from the date of the decree absolute there shall be maintenance at and after the rate of £120 per annum (free of tax), the said sum to be payable monthly.

Now, that is an express statement that the sum is to be £120 per annum free of tax. Quite clearly, the intention was that there was to be in the hands of the lady the sum of £120. That cannot be questioned at all. The husband proceeded to pay these sums, and he deducted the tax. It so happens that a slight confusion was caused by the circumstance that the certificate happened to relate to 10 months, but that does not matter. Paying, as he was, the allowance of £120 per annum free of tax, he signed the certificate in which he said that the gross amount, that is, for the 10 months, was £129, and that he had deducted tax amounting to £29. The substance of the case of the lady was simplicity itself, and it was this: that she had suffered tax to the extent of £29—suffered tax, it is true, by deduction—but the effect of that was that she had not got what she was entitled to get, £120 free of tax. That seemed to me, as indeed it seemed to the commissioners, and indeed as the Attorney-General has admitted it rightly seemed to the commissioners, to be correct. The subject is rather confusing, but this case, I am bound to say, seems to me to be clear. It is clear, I think, that the intention of everybody was—the intention of the court was—that the lady should have her £120 free of tax. The difficulty of an extremely technical character with regard to these words "free of tax" does not arise, because this is an order of the court, and it is an order of the court that she is to have £120 free of tax. In order to carry out that intention of the court, it is, I think, necessary that her present claim should succeed. The commissioners have decided that it does succeed, and I agree with them, and, in agreeing with them, also on the admission of the Attorney-General, I think that, quite clearly, we are carrying out what must have been the intention of those who made the order.

For these reasons I think that the conclusion arrived at by the commissioners was sound, and the appeal is accordingly dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellant); *Winter & Co.* (for the respondent).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

LLOYD *v.* FRANCIS.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Romer and MacKinnon, L.JJ.), **November 15, 16, 1937.**]

Industrial societies—Trading society—Members' debts to society to be liquidated by reduction of capital—Winding up of society—Position of liquidator where rule ignored.

Upon the final winding up of an industrial society in 1936, a dividend of just over 2*s.* in the £ was paid, and the book debts owing to the society were assigned to the plaintiff. The defendant, a member of the society and a holder of capital paid up in the society to the extent of £7 10*s.*, was a debtor to the society in respect of goods supplied to the extent of £22 14*s.* 1*d.* By a rule of the society, the business was to be conducted as far as possible for ready money, and credit was not to exceed four-fifths of the member's paid up share together with any other money the member might have in the society, and at the end of each quarter the capital was to be reduced by the amount of credit outstanding. It was contended that under the rule it was obligatory on the society to write down the member's capital in liquidation of his debt, and that the debt was therefore reduced accordingly, and the defendant was entitled to a set-off against the plaintiff :—

Held : the assignment to the plaintiff was an assignment subject to equities, and, as the liquidator, if he had allowed such a set-off, would have been bound to call for a contribution in the liquidation of the same amount, there could be no such set-off against the plaintiff, and he was entitled to recover the debt in full.

[**EDITORIAL NOTE.** This case explores the position where an industrial society is allowed by the rules to write off paid up capital against debts due to the society. Here the society had not done so, and had allowed the member to incur debts beyond the permitted limit. The point that the society had acted *ultra vires* was not taken, and was expressly reserved by the court. The position upon the liquidation, however, is that the liquidator of the society would be entitled to make the member a contributor in respect of the capital written off, and it then makes no difference whether the rule is complied with or not.

As to Recovery of Debts from Members of an Industrial Society, see HALSBURY, Hailsham Edn., Vol. 17, p. 477, paras. 1018-1020 ; and for Cases, see DIGEST, Vol. 28, pp. 129, 130, Nos. 89-96.]

Appeal from a judgment of His Honour Judge Clark Williams given on Oct. 26, 1937, at the Porth County Court. The facts and arguments appear in the judgment of Sir Wilfrid Greene, M.R.

W. N. Stable, K.C., and *Owen George* for the appellant.

The respondent was not represented.

Sir Wilfrid Greene, M.R. : The Ferndale Industrial Co-operative Society was registered under the Industrial and Provident Societies Act, 1893. Under its rules, any person desirous of becoming a member was to sign a declaration of his readiness to take 5 shares. The capital of the society was to be raised in shares of £1 each. Each member was required to hold at least 5 shares, and was under obligation to pay, in respect of such shares, not less than 3*s.* 6*d.* per share until such payments, together with dividends, had amounted to £5. Any sum due from a member for subscriptions, fines, or other debts, was to be recoverable as a debt due to the society. The rules contained provisions under which members were entitled to withdraw their capital in cash on notice to the committee. The most important rule for the purpose of this appeal is r. 16, which, so far as is material, provides as follows :

> The business of the society shall, as far as possible, be conducted for ready money, and in case of credit, it shall not exceed four-fifths of the member's £5 share, together with any other money the member may have in the society, and at the end of the quarter, if the member has not been cleared on the books, the secretary shall reduce the capital of such member to cover the amount of credit given. Any member reducing his capital below the sum of capital called up shall not receive any dividends or share of profits for that quarter. No new member shall receive any credit until his capital in the society amounts to the sum of £5.

On the construction of that rule, it is argued that the direction for reducing the capital of the member by four-fifths, in the case of credit being given and the account not being cleared, is merely directory, and not obligatory on the society. I am unable to accept that view. It appears to me that this was a provision introduced for the benefit of the society, and that it was obligatory on the society to carry it out. The only way in which it could be relieved from that obligation, which was an obligation for the benefit of everybody, would be by an alteration of the rules. A resolution was passed on Nov. 6, 1931, at a time when the society was obviously in great financial difficulties, to the effect that the withdrawal of capital, either by cash or by goods, should be suspended. I apprehend that the withdrawal by goods has reference to r. 16.

It has been pointed out that that resolution was not passed in accordance with the machinery laid down in r. 48, which provides for the alteration of rules, with the result that it was not effective to alter the provisions of r. 16. The Industrial and Provident Societies Act, 1893, s. 23 (1), to which I should refer, provides :

> All moneys payable by a member to a registered society shall be a debt due from such member to the society, and shall be recoverable as such either in the county court of the district in which the registered office of the society is situate, or in that of the district in which such member resides, at the option of the society.

Sect. 23 (2) provides :

> A registered society shall have a lien on the shares of any member for any debt due to it by him, and may set off any sum credited to the member thereon in or towards the payment of such debt.

The effect of sect. 23 (2) and of r. 16 would appear to be this : under sect. 23 (2), the society had the option to set off a debt owing by a member against the amount paid up on his shares, while under r. 16 that process is compulsory to the extent of four-fifths only of the paid-up capital. The effect of that operation, referred to in sect. 23 (2) as a set-off, and referred to in sect. 16 as reducing the capital of the member, is not, in my opinion, to relieve the member of his obligations of membership in respect of his shares. It is a different process from the withdrawal, under which a member, when he withdraws, ceases to be a shareholder in whole or in part. As I construe the rules and the Act, when that process is put into operation, the effect is that the member still remains a shareholder, and still remains liable to the obligations of a shareholder. One of those obligations is to contribute, up to the extent of his liability on capital account, to the payment of the debts of the society.

The facts of the case are these. On Feb. 9, 1933, an extraordinary resolution for winding-up was passed. That winding-up has been completed, and the final return of the liquidator was dated Jan. 13, 1936. That document is not before us, although it was produced to the county court judge, but we are informed that the final dividend paid was just over 2*s.* in the £, and that the unsatisfied debts amounted to many thousands of pounds. The liquidator, by a document dated June 29, 1935, assigned to the present plaintiff the book-debts owing to the society. The defendant, Mr. Francis, was a member of the society. It appears that at some time the value of the shares in the society was raised from £1 to 30*s.* each, although the manner in which that was done is not before us. At the relevant date, however, Mr. Francis held 5 shares of 30*s.* each, all fully paid up, making him a holder of capital paid up in the society to the extent of £7 10*s.* He was also a debtor to the society in respect of goods supplied, and the total amount of the debt was £22 14*s.* 1*d.* That debt was one of the debts assigned to the present plaintiff by the liquidator on June 29, 1935. The assignee, the present plaintiff, sues Mr. Francis for that debt, and the only defence that was put in was a defence under the Statute of Limitations.

The actual point taken and argued in the county court, however, was a different one, turning on the meaning and effect of r. 16. No point was made here that that was a matter that was not pleaded in the defence, and for a very good reason—namely, that this is in the nature of a test case, because we are told that there are some 60 other cases in which the same point arises. The total amount involved in these 60 cases would appear to be something in the neighbourhood of £500 or £600, in any case a sum totally inadequate to pay to the outside creditors the unpaid amount of their proved debts. The point which was taken before the county court judge, and which found favour with him, was this. It was said on behalf of the defendant that, under r. 16, it was obligatory on the society to write down the amount of his capital in liquidation of the debt that he owed to the society, and that, if that had been carried out, the effect upon his account in the books of the society would have been that his credit to capital account would have been wiped out, and that his debt for goods supplied would have been reduced accordingly. He said that he was not to be penalised by the fact that the officers of the society had not carried out the necessary book-entries to give effect to r. 16, and that he ought to be treated on the footing that that which ought to have been done had been done.

There are two points with regard to that argument. The first is that the obligation to write down the capital account in respect of debts owing to the society for goods supplied is an obligation which extended to four-fifths of the paid-up capital only. Were it valid, that argument could apply only to four-fifths of the £7 10*s.* The other matter is this. No point was taken by the defendant in the court below that the granting of credit over and above the limit laid down in r. 16 was *ultra vires* the society. I say nothing about the validity of that point. It may or may not be a point of substance. It has not been argued here, and it was not taken in the court below. I mention it in order to show that the point has not been overlooked. In any case, it is a point which could not have been taken by the respondent here, and I propose to disregard it.

But the judge, in my opinion, has misdirected himself as to the effect of r. 16, in the circumstances. The assignment by the liquidator to the plaintiff was an assignment subject to equities. It was an assignment, therefore, subject to the rights, if any, to which, having regard to r. 16, the debtors whose debts were comprised in the assignment were entitled. But the position of a member was that, if r. 16 had been carried out according to its terms, the member would still have remained liable to contribute in the winding-up of the society to the extent of the capital unpaid on his shares. If, therefore, the matter had been one between the liquidator and the member, the liquidator claiming payment of the debt and the member claiming what I may call a set-off under r. 16, the liquidator's answer to the member would clearly have been that the only effect of carrying that set-off into effect would have been to leave the member liable in the liquidation to contribute a corresponding amount, and, therefore, the set-off was one to which effect could not be given. It appears to me that the present plaintiff is in precisely the same position, and that he is entitled to take precisely the same point as the liquidator could have taken, and that the member's equity under r. 16 can be met by a counter-equity in the liquidator. Therefore, by the circumstances of this liquidation the member could obtain no advantage by claiming the performance of r. 16. Had the facts been that r. 16, if carried out, would have left him in such a position, having regard to the circumstances of the liquidation, that the whole of his unpaid capital would not have been required to be called up for the purpose of satisfying the liabilities of the society, he might have said that this counter-equity on the part of the liquidator could only be exercised *pro tanto*, and that, therefore, his claim to set-off under r. 16 for the balance remained good. But, having regard to the hopeless insolvency of the society, and to the total inadequacy of this £600, which is in issue in the cases covered by this one, it appears to me that this is a point which could not possibly have been made good. In any case, if there were any facts which would have enabled the defendant to rely on such a point, it was for him to establish them at the trial. He did not attempt to do so, and it was quite obvious that he never could have done so. The result, therefore, in my opinion, is that r. 16 does not, in the circumstances, avail the defendant, and that, accordingly, the plaintiff was entitled, as assignee of the liquidator, to recover the amount of the defendant's debt in full, but that the defendant was not entitled to set off the whole or any part of the amount standing to his credit on capital account under r. 16 or otherwise. The appeal must be allowed.

ROMER, L.J.: I entirely agree, and I desire to add only this. SIR WILFRID GREENE, M.R., has referred to the possibility that any supply of goods on credit to a member of the society in excess of the four-fifths payment of the member's paid-up capital is *ultra vires* the society. If any of the other members of the society against whom proceedings are being taken by the present plaintiff desire to raise that point by way of defence in those actions, which I understand are standing over pending our decision in this case, I would like to say, by way of discouragement, that, if they have obtained goods from the society improperly—goods, therefore, which remain the property of the society—that may give rise to a claim by somebody—by the liquidator or the present plaintiff—against them in respect of the price of the goods.

MacKinnon, L.J.: I agree.

Appeal allowed.

Solicitors: *Wrentmore & Son*, agents for *Thomas W. Lewis*, Merthyr Tydfil and Porth (for the appellant).

[*Reported by* Reginald Townsend, Esq., *Barrister-at-Law.*]

MORRIS *v.* WINSBURY-WHITE.

[King's Bench Division (Tucker, J.), **October 28, 29, November 1, 2, 3, 4, 5, 10, 1937.**]

Medicine—Surgeon—Operation—Liability for acts of resident hospital staff—Tube left in body—Res ipsa loquitur—"Personal attention."

The defendant agreed to perform a surgical operation upon the plaintiff and to give the case his personal attention. After the operation, the plaintiff remained in the hospital, and was attended by nurses and resident medical officers on the hospital staff. During this time he was visited by the defendant some three times a week. The plaintiff's treatment involved the insertion into his body of tubes, and the frequent replacement of these tubes. The tubes were inserted in the first place by the defendant, in the course of the operation, but the replacements were done by resident doctors and nurses. The plaintiff was discharged from hospital on Feb. 10, 1934, and subsequently, as a result of his condition, he visited the defendant on Mar. 28, 1934. There was a dispute as to whether on that occasion he called the defendant's attention to the pain he was suffering. He paid another visit to the defendant on Apr. 11, 1934, when the defendant's attention was drawn to the plaintiff's pain. An X-ray photograph was taken, and it was discovered that there was a portion of a tube in the plaintiff's bladder. In an action for breach of contract and negligence, the judge found as facts (i) that the plaintiff did not inform the defendant on Mar. 28, 1934, that he was suffering pain, and (ii) that the tube that was found in the plaintiff's bladder had not been inserted in or left there during the course of the operation:—

Held: (i) the defendant could not be held responsible for any negligence on the part of any members of the hospital staff.

(ii) in the circumstances of this case, the doctrine of *res ipsa loquitur* was inapplicable.

(iii) the undertaking to give the case his personal attention did not put upon the defendant any duty further than that usually owed by a surgeon to his patient.

[**EDITORIAL NOTE.** In this case an attempt was made to fix a surgeon with liability for the acts of the resident surgeons and nurses of a hospital. Such liability depends upon it being established that the resident staff are the agents of the specialist surgeon. In this case, this was not proved, and to that extent this contention failed *in limine*. The subject of ministerial or professional acts is, however, discussed at some length, and a more important decision is given upon the question whether the doctrine of *res ipsa loquitur* applies to the finding of a tube which has been left in the body of the patient after an operation.

As to Liability of Surgeon, see HALSBURY, Hailsham Edn., Vol. 22, pp. 318-320, paras. 600-605; and for Cases, see DIGEST, Vol. 34, pp. 548, 549, Nos. 67-73, 83-85.]

A Action for damages for breach of contract and/or negligence in the performance of a surgical operation and in subsequent treatment. By the amended statement of claim the plaintiff alleged that he had suffered injury as a result of the breach of contract and/or negligence of the defendant and/or the negligence and/or breach of duty of those for B whom the defendant was responsible in law. The facts are fully stated in the judgment.

J. P. Eddy, K.C., and *I. M. Noordin* for the plaintiff.

R. P. Croom-Johnson, K.C., and *Henry C. Dickens* for the defendant.

Tucker, J.: This is an action brought by Mr. Arthur William C Morris, as the plaintiff, against Mr. H. P. Winsbury-White, for damages for negligence in the performance of an operation performed by the defendant on the plaintiff at the end of 1933 for the removal of the prostate gland, and, further or alternatively, for negligence in his subsequent treatment or supervision of the case.

D The plaintiff is now a gentleman of some 61 years of age. At the time of the matters in question he was aged about 58, and I am satisfied that he was a man of normal health, although not in very good health.

The defendant is a highly qualified surgeon, specialising in genito-urinary diseases. He practises in Harley Street, and is also an honorary E surgeon at St. Paul's Hospital, Endell Street.

The facts of the case, which are outside the realm of controversy, and the relevant dates, are as follow: In Nov., 1933, the plaintiff consulted the defendant on the recommendation of his local doctor, Dr. Dawson. The existence of prostate trouble was diagnosed, and F he entered St. Paul's Hospital, Endell Street, on Nov. 24, 1933. On Nov. 27, there was performed the usual preliminary operation, which consists in the draining off of the bladder preparatory to the major operation, which follows later. On Dec. 18, the major operation was performed by the defendant, and on Feb. 10, 1934, the plaintiff was G discharged from hospital. On Feb. 27, there was a telephone communication from Dr. Dawson to the defendant with regard to the plaintiff's condition. There is no question that there had been no other communication between Mr. Winsbury-White and the plaintiff or Dr. Dawson between Feb. 10 and Feb. 27. On Mar. 28, the plaintiff visited the de- H fendant at the hospital for the purpose of his condition being examined, and it is beyond controversy that, on that occasion, a sound was passed. He returned home, and on Apr. 11 he paid a second visit to the defendant, again at the hospital. An X-ray photograph was taken, and it was at once discovered, as a result of the X-ray, that there was in him a tube, or portion of a tube. It was not quite clear from the X-ray photograph

whether it was wholly or entirely in the perineum, or partly in the perineum and partly in the bladder, but Mr. Winsbury-White, the defendant, formed the view at first sight that it was in the perineum. An operation was performed at 6.30 p.m. the same day, and it was found that there was a tube, or portion of a tube, in the bladder, and that it was not, as it had been thought, in the perineum, except for a small A
portion. The major portion was in the bladder. On May 9, the plaintiff returned home, and, on May 22, he returned to work. From Easter, 1935, down to the present day, he has, according to his evidence, and according to the evidence of Dr. Dawson, which I accept, suffered great discomfort from periodical leaking, that has been coming from somewhere B
in the region of the perineum and/or the rectum. It is better in the summer months, it is worse in the winter. It has undoubtedly been extremely distressing to the plaintiff, and it has been a puzzle to Dr. Dawson as to whether it was coming from a perineal fistula or from a recto-vesical fistula, which Dr. Dawson thinks exists in the plaintiff's C
case. For some three months before the action, Dr. Dawson thought that the perineal opening had finally closed, and that the dampness and leakage from which the plaintiff was suffering were due to the recto-vesical fistula. Examination during the hearing revealed that there were coming from the perineum drops which were discoverable when the D
plaintiff was asked to bend over and strain. None the less, Dr. Dawson still thinks that there is present in the plaintiff a recto-vesical fistula. That is the broad outline of the case, as to which there is very little, if any, controversy.

I think that the issues which arise have been correctly formulated and E
set out in Mr. Croom-Johnson's final speech, and that they are as follows: (i) was there a special contract in this case—and by "special contract in this case" I mean for the purposes of this case—was there some contract between the parties which imposed upon the defendant a higher obligation or a greater responsibility than that which would normally F
fall upon a surgeon who was called in to perform for reward an operation of this kind? (ii) if there was no special contract, what is the duty owed by the defendant, by a specialist surgeon, in a case of this kind, and does the evidence disclose that there has been a failure to perform that duty or to attain to the standard which is required? In other words, has G
he been guilty of negligence?

During the course of the hearing, I think that the negligence which was suggested came under the following headings: (*a*) the defendant had been negligent in leaving a tube in the plaintiff at the preliminary operation on Nov. 27; (*b*) alternatively, he left a tube in the patient at H
the major operation on Dec. 18; (*c*) in any case, the tube got into the plaintiff between Nov. 27 and Dec. 18, in circumstances which make the defendant liable—that is to say, either by reason of the acts of other people for whom he is responsible in law, in the circumstances of this case, or by reason of his negligent failure to ascertain what had in fact

happened ; (*d*) if that is not right, the tube got in between Dec. 18, 1933, and Feb. 10, 1934, also in circumstances which render the defendant liable, namely, in the same circumstances as those I indicated with regard to the previous period ; (*e*) the defendant was negligent in allowing the plaintiff to be discharged on Feb. 10 at a date when he should have A realised that there was something seriously amiss with him, and, in any case, the plaintiff was not in a fit state to be discharged on Feb. 10 ; (*f*) the defendant was also negligent on Mar. 28 in not taking an X-ray photograph ; the circumstances were such that, having regard to the information which he had received and to his previous knowledge of the case, B he should have been put on his guard with regard to the presence of some foreign body in the bladder, the presence of which would not have been discoverable otherwise than by means of an X-ray.

Now, those are the issues. Mr. Croom-Johnson, who appears for the defendant, has submitted that really, on a strict reading of the pleadings, C those issues are not open to the plaintiff. I think that, with regard to the headings which I have called (*a*), (*b*), (*e*) and (*f*), which I will repeat—tube left in on Nov. 27 ; tube left in on Dec. 18 ; negligence in allowing the discharge of the plaintiff on Feb. 10, and negligence in not taking an X-ray on Mar. 28—those are all matters which, taking a broad view of D the pleadings and the particulars, are covered by the pleadings. At any rate, they have been matters which are inextricably mixed up with the evidence which has been given in this case. They are issues of which I think the defendant has always been aware, and of which his witnesses were aware, and with which they were well qualified to deal, and with E which they did in fact deal, and I think that all the issues arising under those heads are sufficiently covered by the pleadings and the particulars. With regard to the issue raised by the allegation that the tube somehow got into the plaintiff either between Nov. 27 and Dec. 18 or between Dec. 18, 1933, and Feb. 10, 1934, by means of some act of some other F person for whom the defendant is responsible in law, on the principle of principal and agent or on that of master and servant, I do not think that those issues are raised by the pleadings in this action. I think that, if it had been intended to put forward the case here that, as a matter of law, Mr. Winsbury-White was responsible for all, or for some, of the G acts of the nurses or other staff in that hospital, or for the acts of the resident medical officers, it should have been so stated with particularity, not only as regards the particular people who it was alleged were his agents, but also with regard to the particular acts of negligence for which it was contended he should be held liable. I do not think that the H pleadings in this case are sufficient to support an allegation of that kind, nor a case founded in that way. If I am wrong in thinking that this is a matter which is not covered by the pleadings, I am none the less satisfied that, if, in fact, the pleadings had been framed in that way, the plaintiff could not have recovered in this action on that ground and under that heading. I think it is well-established as a matter of law that the resident

medical officers in a hospital of this kind, and the nursing staff, are not the agents of a specialist surgeon who comes and performs an operation of this kind, at any rate in so far as they are performing the ordinary routine duties which have to be carried out at a hospital of this kind. The very reason for a patient's entering a hospital of this kind—and it is inherent in the arrangements that he makes with the specialist—is that A
he will go somewhere where he will receive nursing attention, and where he will also receive some attention from the resident medical officers in the hospital. No authority has been cited to me for the proposition that, ordinarily speaking, apart from any special contract (with which I will deal in a moment), a surgeon is responsible for what I call the ordinary B
routine acts of the resident medical officers or the nursing staff in a hospital, in a case of this kind. Mr. Eddy does not contend that Mr. Winsbury-White would have been liable for some error in connection with the insertion of a hot-water bottle, or something of that kind, into the plaintiff's bed, but he says that there is a difference between an act of C
that kind and an act such as must have taken place in this case, if the presence of the tube was in fact due to some carelessness on the part of a sister or nurse or resident medical officer. He says that that is a different kind of thing from the mere routine attention which is involved in the provision of a hot-water bottle, or something of that kind. D

I cannot accept his contention with regard to that. I think that, if this tube did in fact get in during these periods, not by reason of some personal negligence on the part of Mr. Winsbury-White, and not by reason of some lack of supervision on his part, but by reason of some carelessness on the part of the hospital staff or on the part of the resident E
medical officers, the evidence in this case shows that it must have done so in the course of the changing of the tube, which operation is involved in an operation of this kind, and which necessarily takes place quite often during the progress of convalescence. I shall describe these tubes later, but first I shall deal with the question of the perineal tube, that of F
its own comes out during the progress of motions, and such like, and has to be reinserted by a nurse. Furthermore, as the wound heals, it has, from time to time, to be taken out and shortened. That is, in my view, a necessary, ordinary routine hospital process, with which the resident medical officers are not only perfectly qualified to deal, but with which G
it is their function and duty to deal, and it is unthinkable to expect that the surgeon who has performed the operation has to attend at the hospital every time a tube, in those circumstances, is shortened, or, *a fortiori*, every time it is merely put in and out. Since it is not his duty personally to attend and perform those operations, he is not, as a matter of law, H
responsible for any negligence in the performance of those routine operations by the nursing staff or by the resident medical officers. Of course, that leaves entirely open the question as to whether he ought to have become aware of what had happened, or whether he was in fact exercising proper care and supervision over the case. That is another matter

altogether. Therefore, in so far as it is sought to make the defendant liable for the acts of others, I hold, first of all, that that is not open to the plaintiff on the pleadings, and, secondly, that, if it is, it is a proposition which, on the facts in this case, is one which could not succeed, even if it had been so pleaded.

A I therefore pass to what I regard as the real issues in the case, but, before doing so, I think that this is a convenient stage at which to deal with a submission of Mr. Eddy's. In his final address he put his case on the basis of *res ipsa loquitur*. He says that the circumstances in this case are such as to throw on the defendant the onus of showing that he
B was not negligent, or that other people for whom he is responsible were not negligent. It is said: here is the case of a man who was at many material times unconscious. He did not know what was going on; he was in the power of the defendant, or of others for whom the defendant is responsible in law, and, therefore, it is for the defendant to show that
C he has not been negligent, and it is not for the plaintiff to show exactly when, where and how those acts of negligence took place. In support of that proposition Mr. Eddy has relied on many well-known authorities, and he has further referred me to the equally well-known line of authority with regard to the circumstances in which a man or person may be
D liable for the acts of some other person who is not ordinarily his servant, but where, in certain circumstances, he has control over the particular person, who may have been lent to him by the general employer for the purpose of some specific operation, not using "operation" in the technical sense involved in this case. I do not think that the principles of those
E cases apply to the facts in this case, and for this reason. Here you have the plaintiff, it is quite true, under the control, you may call it, of the defendant, or in his power during the operations of Nov. 27 and Dec. 18, and, if the whole controversy in question in this case had been what happened at those operations, it may be that there might be something
F in Mr. Eddy's observations and submissions with regard to that. But that is not this case, because the whole case, as presented by the plaintiff, is that this tube got in, I do not know how, between Nov. 27 and Feb. 10, during the time when he was at the hospital, and while he was being dealt with and treated by numerous nurses and sisters, and two resident
G medical officers and being visited occasionally by the defendant. He was by no manner of means in the control or charge or power of the defendant throughout the whole period, and I think, the doctrine of *res ipsa loquitur* is quite inapplicable to the facts in this case. I think that it is the plaintiff's duty in the ordinary way, before he can succeed
H in this action, to establish by evidence, either out of the mouths of the witnesses that he has himself called or by the witnesses called for the defendant, that the defendant has been guilty of some act of negligence, personally guilty of some act of negligence, which resulted in the presence of this tube in the plaintiff's bladder.

Now I pass, therefore, to deal with the evidence. The first question

is: Was there a special contract in the sense that I have already indicated? That depends very largely upon the evidence given by Mrs. Morris of the interview which she had with the defendant previous to her husband's admission to hospital. The defendant also gave his recollection of what took place at that interview. I think that there is really very little controversy about it between the parties. I think that Mr. Winsbury- A
White did say that he had pledged himself in terms to give this case his personal attention, although he agreed with me that in fact, in his view, that made very little difference as to the nature of his obligations. Of course, in any event his obligation was to perform the operation, and to give the necessary supervision thereafter until the discharge of the B
patient. I think it is, therefore, involved in that that Mr. Winsbury-White did expressly or impliedly intimate that the case would have his personal attention. Whether you call it a special contract or not is quite immaterial, because, in my view, it merely emphasises, if necessary, or it merely contains, all the necessary ingredients of the ordinary case C
where a surgeon is retained to perform an operation of this kind. It is necessarily involved in the retainer that he will perform the operation personally, and I think that it was necessarily involved in such a retainer that he would pay such subsequent visits as were necessary in the ordinary case. It is not necessary for me to deal here with what might be the case D
where after the operation there was some quite abnormal condition, which involved a continuous and lengthy stay in the hospital. In the normal case (and for this purpose I regard this as being a normal and ordinary case), the obligation was to pay such visits as were necessary after the operation, to see how the patient was progressing under the E
care of the nurses in the hospital and of the resident medical officers there. The defendant said, in this particular case, that he would be able to pay some three visits a week, at least, during that period of time, until the plaintiff was discharged, and he did in fact pay those visits, and he did in fact personally perform the operations. I therefore think F
that there was put upon the defendant in this case no duty other than that which exists in the ordinary normal case, and that, so far as a contract between the parties is involved, the defendant carried out his obligations under that contract, apart altogether from the question as to whether or not he was guilty of negligence. G

Judgment for the defendant with costs.

Solicitors: *Edward Oliver & Co.* (for the plaintiff); *Hempsons* (for the defendant).

[*Reported by* Gerald Abrahams, Esq., *Barrister-at-Law.*]

H

Re TURKINGTON, OWEN *v.* BENSON.

[CHANCERY DIVISION (Luxmoore, J.), **November 19, 1937.**]

Will—Construction—Gift to association—Gift applicable as members shall direct—Fund to build masonic temple—Validity.

The testator by his will gave the residue of his estate to a masonic lodge as a fund to build a suitable temple in Stafford :—

HELD : this was a gift to the members of the lodge which they could deal with as they pleased, and the gift was, therefore, good, whether it was charitable or not.

[**EDITORIAL NOTE.** A gift to the members of an association which can be disposed of by them as they shall decide is a gift which is not subject to the rule against perpetuities. The gift in the present case being decided to be such a gift, the question whether or not it was a charitable gift does not arise.

AS TO SUCH GIFTS, see HALSBURY, Hailsham Edn., Vol. 4, p. 131, para. 172 ; and FOR CASES, see DIGEST, Vol. 8, pp. 261-263, Nos. 240-252 ; pp. 325-329, Nos. 1078-1116.]

Cases referred to :

(1) *Re Selous, Thomson* v. *Selous,* [1901] 1 Ch. 921 ; 43 Digest 667, *986* ; 70 L.J.Ch. 402 ; 84 L.T. 318.

(2) *Re Clarke, Clarke* v. *Clarke,* [1901] 2 Ch. 110 ; 8 Digest 263, *250* ; 70 L.J.Ch. 631 ; 84 L.T. 811.

(3) *Re Amos, Carrier* v. *Price,* [1891] 3 Ch. 159 ; 8 Digest 270, *355* ; 60 L.J.Ch. 570 ; 65 L.T. 69.

(4) *Thomson* v. *Shakespear* (1860), 1 De G. F. & J. 399 ; 8 Digest 264, *261* ; 29 L.J.Ch. 276 ; 2 L.T. 479.

(5) *Re Barnett, Waring* v. *Painter Stainers' Co.* (1908), 24 T.L.R. 788 ; 8 Digest 263, *256*.

(6) *Re Porter, Porter* v. *Porter,* [1925] Ch. 746 ; Digest Supp. ; 95 L.J.Ch. 46 ; 133 L.T. 812.

(7) *Re Unite, Edwards* v. *Smith* (1906), 75 L.J.Ch. 163 ; Digest Supp.

SUMMONS to determine whether a gift of the remainder of the estate of Charles Henry Turkington to the Staffordshire Knot Lodge, No. 726, as a fund to build a suitable temple in Stafford, was void, or whether the same was a valid bequest. Also, if the gift was a valid bequest, (i) whether it was a bequest to the Staffordshire Knot Lodge, No. 726, or to the members of such lodge ; (ii) whether the same is subject to any, and, if so, what, trusts or conditions precedent or subsequent, and whether the plaintiffs ought to see that any such trusts or conditions are observed or performed ; and (iii) whether the plaintiffs can deliver the remainder of the estate to the defendants, the master and wardens of the lodge, or to any other, and what other, persons.

The relative clause in the will was :

> 7. I give the residue of my estate to the Staffordshire Masonic Lodge, No. 726, as a fund to build a suitable temple in Stafford.

The testator also directed that his trustees should set aside a sufficient sum to pay £250 a year for 5 years towards the maintenance, education or benefit of his niece if she agreed to come to England for the completion of her education, and the court was asked, by the summons, to say if such legacy was subject to any condition, but it was agreed by all parties that no opposition should be made to this legacy being paid, the condition being disregarded.

L. M. Jopling for the plaintiffs, the executors of the will.

H. B. Vaisey, K.C., and *J. H. Stamp* for the first three defendants, the master and wardens of the lodge. A

Geoffrey Pratt for the three remaining defendants, who were interested as next-of-kin on a contingency.

J. N. Daynes, K.C., and *F. Baden Fuller* for a legatee.

N. C. Armitage for the fourth defendant, who claimed on behalf of the members of the lodge. B

Daynes, K.C.: Where there is a fund for a special purpose, it is enough to create a trust. It is a question whether this is a gift for the general purposes of the lodge or whether it is a gift for a special purpose in such a way as to be a trust, such as for the purpose of building a new temple. In the present case, the legal interest would be in the people C who took the estate, that is, in the lodge. The lodge would be a trustee for every member of the lodge. That is the reason why there is a trust which is enforceable. [Counsel referred to *Re Amos, Carrier* v. *Price* (3), *Thomson* v. *Shakespear* (4), *Re Barnett, Waring* v. *Painter Stainers' Co.* (5), *Re Porter, Porter* v. *Porter* (6).] D

Pratt: The only other point to which I would like to draw attention is the case of *Re Unite, Edwards* v. *Smith* (7), where the bequest was the provision of a new building and equipment. In the present case, the words are "as a fund to build a suitable temple." I adopt the argument of *Daynes, K.C.* E

Vaisey, K.C.: The gift is to the Staffordshire Knot Lodge, No. 726. This is not a charity. As to what is a lodge and what a masonic lodge is in general the court has been informed. The members have power to deal with the general fund in any manner they may think fit. The whole question is whether it is a trust. It is not a gift to trustees for a F particular club. It is not a gift to the executive officers of the club to do something with. It is a gift out-and-out to the beneficiary itself. If a sum of money is given to a club to buy new furniture, or to provide a new range for the kitchen, or something of that sort, then it is not a gift to trustees to do something for a beneficiary. It is merely an G indication of the testator's motive, and the use of the money by the beneficiary will not be hampered if the furniture, or whatever it is, is not wanted. There is nothing to prevent the beneficiary complying *pro forma* with the donation. If the words "to build a suitable temple" are essentially directory, the lodge is to build a new temple. Supposing H that, after it has been built, it becomes too small, has the lodge to build another? It is a matter of common knowledge that in many towns there are masonic rooms, commonly called temples, which are used by a number of lodges. There are in existence many masonic temples which are not the property of any particular lodge. They are merely places to which many masonic lodges resort. The words are a very sketchy outline of what the testator intended. Assuming that this was not a trust, and that the question of perpetuity did not arise, how could the court enforce the provision? It would be hopeless. I ask the court, having regard to the uncertainty and loosely expressed words which are found in this will, not to spell out a trust where no real trust exists. The testator has used such uncertain expressions that he must have intended to give something to the lodge as a fund to build a suitable temple. I ask the court to say that this is not a trust. First of all, it is a gift to the beneficiary. Secondly, it is vague and uncertain. There is merely a vague indication of a purpose. This does not fetter the lodge. [Counsel referred to *Re Clarke, Clarke* v. *Clarke* (2).]

Stamp: A person cannot be a trustee for himself. In this case, there cannot be a trust, because any trust would be only for the benefit of the class. If it is a condition, it could not be a condition precedent, because the lodge could not use the money to build a house until they actually had the money. If it is a condition subsequent, it is void for perpetuity, because there is no time limit. Therefore, it is a case of intention, and the donee can have regard to the intention as to whether it suits his purpose or not. This is a direct gift to the body, and they are the only persons interested in carrying out the intention. There is indicated only a purpose which the body is entirely at liberty to disregard. If the purpose is carried out, the body can sell the house and use the money for its general purposes. [Counsel referred to *Re Clarke, Clarke* v. *Clarke* (2).]

Daynes, K.C., in reply.

LUXMOORE, J.: The question which I have to determine is whether the gift which the testator made of the remainder of his residuary estate, after certain specific gifts out of it, is a valid gift or not in favour of the Staffordshire Knot Masonic Lodge, No. 726. The will contains the appointment of the plaintiffs as his executors and trustees. There is a devise and bequest of all the testator's real and personal estate upon trust for sale and conversion, and then there is a direction that the trustees should stand possessed of the proceeds of such sale and conversion upon the following trusts. Then follows a certain specific provision. There is a proviso, first of all, for the payment of a sum for the maintenance and education or benefit of the testator's niece, June Edith Turkington, which I need not refer to more particularly at the moment. Then there is a gift to the Church Council of St. Chad's, Stafford, of £500, to be spent on interior decoration. Then, following that, a gift to the Church Council of St. Mary's, Stafford, of £1,000, to be spent in or about the organ, lady chapel and chancel in wood-carving or panelling. In cl. 7 there is the gift:

> I give all the remainder of my estate to the Staffordshire Masonic Lodge, No. 726.

Pausing there, that is admitted to be the Staffordshire Knot Lodge, No. 726. The gift continues as a fund to build a suitable temple in Stafford.

It is contended on behalf of the residuary legatees that the gift to the masonic lodge is a void gift, because it tends to create a perpetuity. My attention has been called to a number of cases with regard to charities and other gifts in favour of unincorporated bodies, but I really think that none of those cases, except in so far as they lay down the general principles, is really germane to the point which I have to consider. If the gift had been for the Staffordshire Knot Masonic Lodge, No. 726, without anything further, there could have been no question as to its validity: the gift would have been a gift to that body of persons or that society, so that the members for the time being, acting in accordance with their constitution, could deal with the property as they thought fit. It is admitted by Mr. Daynes that he could not have attacked the gift if it had been in that form. The attack made on the gift is because of the words that follow: "as a fund to build a suitable temple in Stafford." Mr. Daynes has argued that that constitutes a binding trust, which limits the purposes for which the money left by the subject-matter of the gift could be used to the building of a suitable temple, and that, even supposing that the temple were built and sold by the lodge under a resolution of its members, even then the trustees for sale would still be impressed with a trust. The whole question is whether this is a trust or whether it is simply an indication by the testator of the purposes for which he would like the money to be expended, without imposing any trust on the beneficiary. It is to be observed that the gift is to the lodge, and that must mean to the members for the time being. There is no separate trustee of the fund constituted. The beneficial interest in the fund is in the persons who are the trustees—in the body which is said to be the trustee—and, in those circumstances, where one finds the legal and equitable estate equally and co-extensively united in the same person or entity, the equitable interest merges in the legal interest, on the footing that a person cannot be a trustee for himself.

The decision of Farwell, J., as he then was, in *Re Selous, Thomson* v. *Selous* (1), seems to me to lay down the governing principle which is applicable to this case. I therefore hold that this gift is a gift to the masonic lodge for the purposes of the lodge, and that the members of the lodge for the time being are at liberty to deal with it in accordance with their constitution in the ordinary way, in the way they think fit; in other words, they have complete domination over the fund. I think the decision of Byrne, J., in *Re Clarke, Clarke* v. *Clarke* (2), also governs the present case. In that case, the testator had left a sum of money to the committee for the time being of the Corps of Commissionaires in London to aid in the purchase of their barracks, or in any other way beneficial to that corps. Byrne, J., in dealing with that case, held that the gift, on the footing that it was a gift to the Corps of Commissionaires, was to aid in the purchase of their barracks, and he also dealt with it having regard to the words that followed, but, when he was dealing with the first part of the gift, a gift to aid in the purchase of their barracks, what he said was:

> The form of the gift here is "to the committee for the time being of the Corps of Commissionaires, to aid in the purchase of their barracks." Now, it is true enough that "to aid in the purchase of their barracks" rather points to something that is to last for a considerable time. I do not think I need go into the question of whether the fund for the creation of the barracks is, in fact, itself a charitable fund or not. I think there is considerable room for argument; but it does seem to me that all the members of the society constituted as this one is could, if they so pleased, and unless the building of the barracks be a charity, deal with the funds intended for building or with the buildings just as they please. If it is a charity they could not deal with them as they pleased, but then the gift is perfectly good. If it is not a charity they could deal with them as they please, because there is nothing to prevent all the members of the association joining together to dispose of the funds or of the barracks.

It seems to me that every word of that passage applies to the present case; and in this case I am satisfied that the members for the time being of the Staffordshire Knot Masonic Lodge, No. 726, are entitled, under the gift which is made to that lodge, to deal with the fund in the ordinary way in which their constitution allows them to deal with their ordinary property.

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Pickering & Pickering*, Stafford (for the plaintiffs, the executors of the will); *F. W. Davy*, agent for *Oswald Owen*, Stafford (for the master and wardens of the lodge, and for a defendant who claimed that the members of the lodge were the persons entitled); *Gibson & Weldon*, agents for *Hand, Morgan & Co.*, Stafford (for an infant claiming to be entitled to a legacy); *Miller & Smiths*, agents for *Thomas Bagley*, Stone (for three defendants interested as next-of-kin on a contingency).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

MORGAN *v.* TARENI COLLIERY CO., LTD.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Romer and MacKinnon, L.JJ.), **November 9, 10, 29, 1937.**]

Workmen's Compensation—Average weekly earnings—Shortage of work—Voluntary spread-over arrangement—Senior man—Custom for junior workmen to be withdrawn first—Rate of remuneration—Workmen's Compensation Act, 1925 (c. 84), *s.* 10 (i).

The appellant during the 12 months immediately preceding the accident was a senior collier, and in the ordinary course would have been employed during the whole of the period, there being a custom on a shortage of work for junior men to be withdrawn first. Owing to shortage of work in the colliery, an arrangement was made whereby during part of the period each man worked one week in three, and later each man worked one week in two. This spread-over system was adopted voluntarily by the men. It was contended that the average weekly earnings must be calculated on the footing that the failure to earn remuneration by reason of the spread-over system did not affect the rate of remuneration:—

HELD: as soon as the spread-over arrangement was made, although it was voluntary in its inception, it fixed the conditions of the appellant's employment, which then became in its essence intermittent. The average weekly earnings were, therefore, the actual earnings during the 12 months divided by 52.

[**EDITORIAL NOTE.** The basis of the present decision is that the arrangement made, though a voluntary one in its inception, yet regulated, once it was made, the earnings of all the men employed in the colliery. Although the decision works to the detriment of senior men, it will, on the other hand, better the position of A
the junior workman.

As to Average Weekly Earnings, see HALSBURY 1st Edn., Vol. 20, Master and Servant, pp. 205, 206, para. 455 ; and for Cases, see DIGEST, Vol. 34, pp. 422-430, Nos. 3430-3502. See also WILLIS'S WORKMEN'S COMPENSATION, 30th Edn., pp. 294-305.]

B

Cases referred to :

(1) *Perry* v. *Wright, Cain* v. *Leyland & Co.* (1900), *Ltd., Bailey* v. *Kenworthy, Ltd., Gough* v. *Crawshay Brothers, Cyfartha, Ltd.*, [1908] 1 K.B. 441 ; 34 Digest 409, *3329* ; 77 L.J.K.B. 236 ; 98 L.T. 327 ; 1 B.W.C.C. 351.

(2) *Carter* v. *Lang & Sons*, [1908] S.C. 1198 ; 34 Digest 428, case *3483 ii* ; 1 B.W.C.C. 379. C

(3) *Anslow* v. *Cannock Chase Colliery Co., Ltd.*, [1909] A.C. 435 ; 34 Digest 422, *3431* ; 78 L.J.K.B. 679 ; 100 L.T. 786 ; 2 B.W.C.C. 361, 365.

Appeal of the applicant from an award of His Honour Judge Clark Williams made at Port Talbot County Court and dated June 18, 1937.

J. Alun Pugh and *Anthony Ward* for the appellant. D

William Shakespeare for the respondents.

Sir Wilfrid Greene, M.R. [delivering the judgment of the court] : The appellant was a coal-cutter employed in the respondents' colliery. On Feb. 14, 1933, he was certified as partially disabled by silicosis. Later E
he became totally disabled, and a certificate to that effect was given on Mar. 17, 1936. The question which arises upon this appeal is as to the basis upon which his average weekly earnings, during the 12 months immediately preceding the date of the first certificate, ought to be ascertained, for the purpose of calculating the weekly payment to which he is F
admittedly entitled in respect of his total incapacity.

The arbitrator has awarded the weekly sum of £1 3*s*. 5*d*., based on average weekly earnings of £2 3*s*. 10*d*. a week. The appellant says that his average weekly earnings, if calculated according to proper principles, amounted to over £3 a week, which would entitle him to the maximum G
payment of 30*s*. a week.

The appellant was, at the material time, ninth in seniority of service out of over 100 colliers employed at the colliery. By a long-standing arrangement between the men and the employers, the junior men were withdrawn first, whenever there was insufficient work for all. Under H
this arrangement, which we will refer to as the seniority rule, the appellant, who was a very senior man, would have been able to claim employment so long as any collier's work was available at the colliery.

In June or July, 1932—that is to say, about half-way through the relevant period of 12 months which preceded the original disablement

—an important customer of the colliery closed its works. Work had already been slack for some time, but the loss of this customer produced a crisis. The respondents accordingly proposed that two districts should be stopped and that the remaining district should be worked by the men on a spread-over system, so as to avoid the withdrawal of any men.
A This proposal was agreed to by the men, and the result, of course, was that the seniority rule was temporarily suspended. Under this spread-over system of working, each man worked one week in three until the middle of Oct., 1932, and thereafter one week in two, until just before Christmas, when work again became regular for all the men. If the
B seniority rule had been adhered to, the appellant, and other senior men, would have been in continuous work during the whole period, and the junior men would have had no work at all. It is not clear from the evidence, nor does the arbitrator find, whether the inception of the spread-over system or its continuance was due entirely to the loss of the
C customer, or in part to that loss and in part to the general depression which had affected the colliery during the first half of 1932.

The arbitrator, for the purposes of his award, took the appellant's actual earnings during the 12 months and calculated the average therefrom by dividing the aggregate earnings by 52. The appellant claims
D that, inasmuch as he would have been in full work throughout the 12 months if the seniority rule had not been suspended, he ought not to be penalised by what was a voluntary arrangement, entered into by himself and by other senior men for the benefit of their fellow-workmen. His case is put in two ways. First, it is said that, in arriving at his
E total weekly earnings, he ought to be treated as having earned the wages which he would have earned if the seniority rule had not been suspended —in other words, that he ought to be treated as having voluntarily surrendered part of his wages to the junior men. Alternatively, it is said that the spread-over period ought to be treated as an abnormal
F period, and ought to be excluded altogether in calculating his average weekly earnings.

Before discussing these contentions, we must refer to the relevant provisions of the Act, and to certain cases in which they have been considered.

G By sect. 9 (2), the workman's weekly payment is (subject to a provision not here material) to be a sum not exceeding 50 per cent. of his average weekly earnings during the previous 12 months, if he has been so long employed by the same employer, but, if not, then for any less period during which he has been in the employment of the same employer.
H Sect. 10 (i), so far as material, provides as follows:

> Average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated.

To quote the words of FLETCHER MOULTON, L.J., in *Perry* v. *Wright* (1), at p. 357:

> This rule expresses, to my mind, the dominant note of this part of the schedule.

> It imposes on the court the duty of ascertaining what remuneration the workman would receive in a normal week in the employment in which he was engaged at the time of the accident, and gives it freedom to do so in the manner best calculated to arrive at a fair result.

The object of the computation is to ascertain the rate per week at which the workman was being remunerated. The word "rate" has an important significance, and must be read in conjunction with the direction that the average weekly earnings to be regarded are those earned during the previous 12 months, or lesser period, as the case may be. In the simple case of a workman working for the whole 52 weeks at, for instance, £3 a week, the rate at which he is remunerated is £3 a week. If his wages vary week by week, the rate, ascertained by reference to his average weekly earnings, will be his aggregate earnings for the 52 weeks, divided by 52. But, if, while remaining in the same employment, for some reason he earns no wages during one or more weeks during the year, more complicated questions arise. He may, for instance, be absent for a fortnight owing to ill-health. The fact that during that period he earns no wages does not affect the rate of his remuneration, and, accordingly, the correct method of calculation will be to divide his aggregate wages earned during his 50 weeks of work by 50, and not by 52: *Carter* v. *Lang & Sons* (2), *Anslow* v. *Cannock Chase Colliery Co., Ltd.* (3). It was considered by Fletcher Moulton, L.J., that the same principle would apply in the case of stoppages due to breakdowns at the works, which were not "normal and recognised incidents" of the employment: *Bailey* v. *Kenworthy, Ltd.* (1), at p. 374.

On the other hand, the failure to earn wages during a particular period may be due to such a cause that it does in truth affect the rate of remuneration. If, for example, in a particular employment, there is a fixed and recognised holiday during which the men do not work, such as Wakes week, the rate at which the workmen in that employment are remunerated must be arrived at by treating the wages earned during their weeks of work as spread over the whole of the 52 weeks of the year. As Fletcher Moulton, L.J., said in *Perry* v. *Wright* (1), at p. 362:

> The enforced idleness of these periods is an incident of the employment of such workmen. . . . The wages earned by such workmen in the year are represented by 50 times £2, and not by 52 times £2, and the employer has a right to claim that this shall be recognised in calculating the average weekly earnings just as much as any other lack of continuity in employment which is inherent in the employment itself.

The same principle was applied in *Anslow* v. *Cannock Chase Colliery Co., Ltd.* (3) to the case of a stoppage of work which lasted for 14 weeks. In that case Sir H. H. Cozens-Hardy, M.R., at p. 364 states the test to be:

> What were his earnings in a normal week, regard being had to the known and recognised incidents of the employment?

This decision was affirmed by the House of Lords, who approved of the test laid down by Sir H. H. Cozens-Hardy, M.R. Lord Loreburn, L.C., said, at p. 367:

> If the workman takes a holiday and forfeits his wages, that does not interfere

> with what he can earn. It is only that for a month he did not choose to work. But if it is one of the incidents of his employment to stop for a month, then he cannot earn wages for that time in that employment, and his capacity of earnings is less.

We now return to the arguments put forward by the appellant on this appeal. The first argument—namely, that he ought to be treated as having earned the wages which he would have earned if the seniority rule had not been suspended—really requires no answer. It would involve treating the workman as having earned wages which he did not in fact earn, and, as a corollary, it would involve treating the junior workmen as not having earned wages which they did in fact earn. But the second argument is a more plausible one. It is said that, upon the principles which were laid down in the authorities to which I have referred, the spread-over period ought to be treated upon the same basis as a period of illness, or an abnormal stoppage of the kind referred to by FLETCHER MOULTON, L.J., in *Bailey* v. *Kenworthy, Ltd.* (1). The effect of this would be that the two weeks in three, and (later) the one week in two, during which the appellant did not work would be excluded from the average computation.

As in the case of the first argument, it would be necessary, upon this principle, to treat the junior men, who would not have earned wages but for the spread-over arrangement, as having earned no wages at all during the spread-over period. This result Mr. Pugh, on behalf of the appellant, accepted as inevitable, but he contended that it did not necessarily affect the soundness of his argument. Nevertheless, it is difficult to see how a method of calculation leading to a result so unfair to the junior workmen can be correct.

In our opinion, the conclusion of the arbitrator, who decided against the appellant's contention, was right. The conditions of the appellant's employment during the spread-over period were fixed by the arrangement made between the employers and the men. As soon as this arrangement was made, the conditions under which the appellant was employed were that he should work, at first, one week in three, and, later, one week in two, and his employment became in its essence intermittent. It was not possible for him to earn during the period more wages than he did, and, once the arrangement was made, his periods of enforced idleness were, in our opinion, on exactly the same footing as was the period of stoppage dealt with in *Anslow* v. *Cannock Chase Colliery Co., Ltd.* (3). It is true that the arrangement on the part of the men was voluntary in its inception, but, once made, it regulated the conditions of employment of all the men, and determined the wages which they could earn. On exactly the same principles, the average weekly earnings of a junior workman would be ascertained by including in the calculation the wages earned by him during the spread-over period, since it was a condition of his employment that he should be entitled to do the work which would earn for him those wages. The result is one involving some hardship upon the appellant, but we can see no ground in principle upon which his claim can be supported. The appeal must be dismissed, and dismissed with costs.

Appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors: *John T. Lewis & Woods*, agents for *Randell, Saunders & Randell*, Swansea and Llanelly (for the appellant); *Furniss, Stephen & Co.* agents for *A. J. Prosser*, Cardiff (for the respondents).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

DUNSTAN *v.* BENNEY.

[COURT OF APPEAL (Greer, Slesser and Scott, L.JJ.), **November 19, 22, 1937.**]

Agriculture—Agricultural holding—Compensation for disturbance—Notice to quit—Whether land cultivated according to the rules of good husbandry—Expenses of tenant in consulting a surveyor—Whether expenses incurred in preparation of a claim for compensation—Agricultural Holdings Act, 1923 (*c.* 9), *s.* 12 (6).

A landlord gave his tenant notice to quit under the provisions of the Agricultural Holdings Act, 1923, s. 12, on the ground that the land was not being cultivated in accordance with the rules of good husbandry. The tenant called in a surveyor to refute this contention. It was contended on behalf of the landlord that, as the tenant had not got any right to a claim for compensation at that time, the expenses of this surveyor could not be expenses incurred in a claim for compensation within the terms of sect. 12 (6) of the Act:—

HELD: it was essential for the tenant to call in a surveyor, in order to refute the landlord's allegation, and this was an expense incurred in preparation of a claim for compensation, and was, therefore, included in the terms of sect. 12 (6).

[EDITORIAL NOTE. The compensation in respect of loss or expense unavoidably incurred in quitting the holding is to include expenses incurred in the preparation of a claim for compensation. It is here held that the securing of expert evidence for refuting the landlord's allegation that no compensation will be payable is an expense incurred in the preparation of the claim.

AS TO COMPENSATION FOR DISTURBANCE, see HALSBURY, Hailsham Edn., Vol. 1, pp. 364-366, para. 599; and FOR CASES, see DIGEST, Supp., Agriculture, Nos. 266*e*-266*t*.]

Cases referred to:

(1) *Agriculture and Fisheries Minister* v. *Dean*, [1924] 1 K.B. 851; Digest Supp.; 93 L.J.K.B. 374; 130 L.T. 709.

(2) *Spreckley* v. *Leicestershire County Council*, [1934] 1 K.B. 366; Digest Supp.; 103 L.J.K.B. 200; 150 L.T. 9.

(3) *Re O'Connor & Brewin's Arbitration*, [1933] 1 K.B. 20; Digest Supp.; 101 L.J.K.B. 706; 147 L.T. 386.

(4) *Re Evans & Glamorgan County Council* (1912), 76 J.P. 468; 42 Digest 3, 7.

APPEAL from a decision of His Honour JUDGE LIAS given at Helston County Court on Mar. 9, 1937, answering a question submitted to him by arbitrators acting under the Agricultural Holdings Act, 1923.

The facts of the case are fully set out in the judgments.

N. J. Laski, K.C., and *J. Lhind Pratt* for the appellant.

C. H. Grundy for the respondents.

Laski, K.C.: A tenant must prove that he has suffered some loss or expenses of the type specified in the Act. [Counsel referred to *Agriculture and Fisheries Minister* v. *Dean* (1), *Spreckley* v. *Leicestershire County Council* (2), and *Re O'Connor & Brewin's Arbitration* (3).] The tenant had suffered no loss, but he called in a witness to prove that he had suffered a loss, and the judge said that the expenses of calling that witness were sufficient to give him a claim for compensation. If that is right, where a man has a hopeless case, he merely has to call a witness and he will then get the costs of the witness as part of the costs of an arbitration. [Counsel referred to *Re Evans & Glamorgan County Council* (4).] A tenant can claim if he has incurred a loss directly connected with leaving a holding, but not otherwise. These costs were incurred, not in leaving the holding, but in preparing a claim for compensation. They are part of the costs of the arbitration. It is submitted that the word "or" in sect. 12 (6) means "and," and that a tenant cannot get compensation unless he has had both loss and expense.

Pratt, following on the same side: The respondent could not reasonably incur the expenses of calling in a surveyor until he had a claim for compensation. One cannot incur expenses merely in order to get a claim.

Grundy: Expenses include any expenses reasonably incurred by a tenant in preparation of his claim for compensation. No expenses could more reasonably have been incurred than were those in this case. If the land had been cultivated against the rules of good husbandry, the landlord could have brought a claim against the tenant.

Laski, K.C., in reply.

GREER, L.J.: This is an appeal from an order made by His Honour JUDGE LIAS in the county court at Helston, in which he answered a question which was submitted to him by arbitrators acting under the Agricultural Holdings Act. He decided the case in favour of the tenant's contention, and we are asked by the appellant to say that he was wrong. In order to decide that, one has to look at the somewhat artificial legislation that has been passed in this matter. The first matter to consider is this: it is provided by sect. 12 of the Act:

> (1) Where the tenancy of a holding terminates by reason of a notice to quit given by the landlord, and in consequence of such notice the tenant quits the holding, then, unless the tenant—(*a*) was not at the date of the notice cultivating the holding according to the rules of good husbandry . . . unless the notice to quit states that it is given for one or more of the reasons aforesaid [compensation is payable].

That is an artificial rule which sometimes may produce injustice to the landlord, because the landlord may be wrongly advised, or through some inadvertence may have omitted to state, in his notice, what the ground of the notice was. However, we are not troubled with that in the present case, because the notice stated that in so many words, and the ground on which it was given was that the tenant at the date thereof—that is, at the date of the notice—was not cultivating the holding known as

Part Budock Vean according to the rules of good husbandry, and the question which would have to be determined at a later date, when the notice to quit expired, is not whether it should be proved at the date of the expiration of the notice whether the tenant was in fact cultivating the farm according to the rules of good husbandry, but whether he was so cultivating it at the date of the notice. Then it is provided by sect. 12 (6) as follows :

> The compensation payable under this section shall be a sum representing such loss or expense directly attributable to the quitting of the holding as the tenant may unavoidably incur upon or in connection with the sale or removal of his household goods, implements of husbandry, fixtures, farm produce or farm stock on or used in connection with the holding, and shall include any expenses reasonably incurred by him in the preparation of his claim for compensation. . . .

In the present case, it was absolutely essential to the tenant that he should be prepared to meet the landlord's contention that at the date of the notice he was not in fact cultivating this farm in accordance with the rules of good husbandry. What could be a better or more reasonable act than getting in an expert at that time to provide the tenant with the means of meeting the landlord's allegation, which he would have to meet at the expiration of the notice ? It would not have been reasonable at all to ask him to postpone taking the necessary measures until the expiration of the notice. The only reasonable way of dealing with the notice, so as to enable him to meet the case after the expiration of the notice, was to act immediately, and necessarily to incur the expense of calling in a surveyor. This expense he incurred, calling in a Mr. Coad. In my judgment, that was an expense which he unavoidably incurred within the meaning of sect. 12 (6), and also an expense which he reasonably incurred within the meaning of the latter part of the middle of that section, " in the preparation of his claim for compensation." His claim for compensation was fortunately limited to the payment of this expense in this particular case only. It might well be that in some cases he would have a claim for compensation by reason of the cost of removal, and also a claim for compensation by reason of the expenses so incurred. In my judgment, the judge was quite right in the view he adopted.

I think it unnecessary to decide whether the costs of Mr. Brewer were reasonably incurred. It is sufficient to determine this case on the ground that the costs of employing Mr. Coad were reasonably incurred, because, if they were, then the measure of the liability is stated in the statute. It is stated by the judge to have been agreed ; that is to say, if there was any compensation to be paid, it was to be a year's rent. We have been treated to an interesting argument by Mr. Laski and by his junior, Mr. Pratt, who contend that no effect can be given to the words " or expense directly attributable to the quitting of the holding," unless there is a case of some other kind. I cannot so read the section. The section, when it uses the word " or," means " or," and it does not mean " and." I think that the expense which was incurred by the tenant here was an unavoidable expense, and was an expense reasonably incurred, and was a matter he was entitled to bring before the arbitrators and have decided by them. There is a curious mistake made by the arbitrators in para. 7; it is only a verbal mistake. They state there :

> The tenants did not incur any loss or expense directly attributable to the quitting of the holding upon or in connection with the sale or removal of their household goods, implements. . . .

I think that that is to be taken to mean that he did not incur any loss or expense except as hereinafter stated, because otherwise it would be quite futile to state a case, unless they meant to state a case with reference to the fees of Mr. Brewer and Mr. Coad. Then they say :

> They, however, are liable to pay Mr. Brewer a fee for viewing the farm so that he could be properly informed to enable him to prepare the tenants' claim for compensation for disturbance which claim was not reduced into writing pursuant to the agreement set forth in para. 4 hereof and they are further liable to pay Mr. John Coad of St. Keverne licensed valuer a fee for viewing the farm immediately after receipt of the said notice to quit and qualifying to give evidence that the allegation in the said notice to quit that the tenants were not cultivating according to the rules of good husbandry could not be proved.

That notice was never withdrawn, and, during the whole of the year which expired from the delivery of the notice until the expiration of the notice, the notice was maintained by the landlord, and the tenant had, in the circumstances, to incur expense in the preparation of this claim, and that expense is sufficient, in my judgment, to bring into effect the provisions of sect. 12 (6). For these reasons, I think that the appeal fails, and must be dismissed with costs.

SLESSER, L.J. : I am of the same opinion. The Agricultural Holdings Act, 1923, s. 12 (1), provides that : "Where the tenancy of a holding terminates by reason of a notice to quit given by the landlord, and in consequence of such notice the tenant quits the holding," compensation for disturbance shall be payable by the landlord to the tenant in accordance with the provisions of the section, unless certain events happen, of which the first is (*a*) that the tenant "was not at the date of the notice cultivating the holding according to the rules of good husbandry," and the notice to quit must state that it was given for that reason or for the other reasons stated in the section. In accordance with that provision, the landlord in this case, on July 7, duly gave to the tenant notice to quit for the reason :

> that at the date hereof you were not cultivating the holding known as Part Budock Vean according to the rules of good husbandry.

If that contention of the landlord were sustained, it would follow that the tenant would lose the right to compensation which he otherwise possessed under sect. 12 (1), and it is therefore necessary, in the preparation of his claim, that he should be able to deny that contention raised by the landlord, which, if true, would have the effect of defeating his claim.

Now, by sect. 12 (6), the amount of compensation payable is defined thus :

> The compensation payable under this section shall be a sum representing such

> loss or expense directly attributable to the quitting of the holding as the tenant may unavoidably incur. . . . in connection with the sale or removal of his household goods, implements of husbandry, fixtures, farm produce or farm stock on or used in connection with the holding. . . .

Then follow these words:

> and shall include any expenses reasonably incurred by him in the preparation of his claim for compensation (not being costs of an arbitration to determine the amount of the compensation). . . .

Now, in my opinion, had those latter words, which are to be considered in this case, not been included, there might have been some doubt as to what exactly would be the position of a person incurring such an expense which would not be directly attributable to any of the matters specifically mentioned in the earlier limb, and therefore presumably would not have been losses or expenses within the meaning of sect. 12 (6), for which compensation was obtainable, but the legislature has in terms provided that the losses or expenses shall include any expenses reasonably incurred by the tenant in the preparation of his claim for compensation. As, in my opinion, as I have stated, the meeting of the landlord's contention that the tenant was not cultivating the holding according to the rules of good husbandry was a necessary part of the tenant's claim for compensation, as is found as a fact by the county court judge, it follows that it is a loss or expense within the meaning of sect. 12 (6). The actual finding of the judge is this: "Without Coad's evidence, it would have been impossible to put forward a claim for compensation."

I have only to add a word with regard to the one particular type of cost which is set out within the brackets, and which is an exception, so that the incurring of it would not therefore be included as an expense—that is, the costs of an arbitration to determine the amount of the compensation. As I have said, in my opinion the right to compensation arises out of sect. 12 (1). The measure of the compensation, the sum, as it is called in the subsection, arises out of sect. 12 (6), but there are cases where costs may be incurred, not to determine whether a man has a right to claim compensation or not, but to determine, in the language of the section, "the amount of the compensation." Two of these immediately occur to one. The first is that it is further provided, reading on in sect. 12 (6), that, for the purposes of this Act, the sum shall:

> be computed at an amount equal to one year's rent of the holding, unless it is proved that the loss and expenses so incurred exceed an amount equal to one year's rent of the holding, in which case the sum recoverable shall be such as represents the whole loss and expenses so incurred up to a maximum amount equal to two years' rent of the holding.

The claim, therefore, which involved costs not only to support the claim but also to show that the amount of compensation should be more than one year's rent of the holding, albeit it could not be more than two, would be the costs involved to determine the amount of the compensation. Another illustration is to be found in sect. 12 (8), which provides that, where the tenant holds two or more holdings and receives notice to quit, the compensation in certain cases, which I need not discuss :

> shall be reduced by such amount as is shown to the satisfaction of the arbitrator to represent the reduction (if any) of the loss attributable to the notice to quit by reason of the continuance in possession by the tenant of the other holding or holdings.

A That subsection also might raise questions which would involve expenses, being costs of an arbitration to determine the amount of the compensation. In so far as the present costs are not to determine the amount of the compensation, but are reasonably incurred in the claim for compensation, they are costs and expenses within the meaning of sect. 12 (6), and B consequently, in conformity with the decision of this court in the case of *Agriculture & Fisheries Minister* v. *Dean* (1), and in conformity with the provisions of the statute itself, the tenant is entitled to a sum equivalent to one year's rent of the holding. I agree that this appeal fails.

C

SCOTT, L.J. : I agree with the judgments which have been delivered, but I would like to add a word or two on the history of the section. It began in 1908, in the Agricultural Holdings Act of that year. By sect. 11 of that Act it was provided that :

D

> Where—(*a*) the landlord of a holding, without good and sufficient cause, and for reasons inconsistent with good estate management, terminates the tenancy by notice to quit. . . . the tenant upon quitting the holding shall, in addition to the compensation (if any) to which he may be entitled in respect of improvements, and notwithstanding any agreement to the contrary, be entitled to compensation for the loss or expense directly attributable to his quitting the holding which the tenant E may unavoidably incur upon or in connection with the sale or removal of his household goods, or his implements of husbandry, produce, or farm stock, on or used in connection with the holding.

That was the whole of the provision at that stage, identical in effect with a portion of sect. 12 (6) of the Act of 1923, but excluding the critical words which are contained in subsect. (6). They were introduced F first in 1920, when, by the Act of that year, the whole of sect. 12, as it now stands in the Act of 1923, was, as far as I can see, passed in its present form. The fact that to the provision about loss or expenses in connection with the sale or removal are added words relating to expense in connection with the preparation of the claim, to my mind, G makes it clear that the legislature then contemplated the necessity of the defendant incurring expense in order to make good his claim in the circumstances that might exist. For instance, a case may be put forward by the landlord, and denied by the tenant. The expense of meeting such a case ought reasonably to be regarded as an expense H caused by the notice to quit, and for that reason Parliament provided that it, too, should be regarded as the equivalent of compensation for disturbance, just as if it had been an actual expense on removal. I entirely agree with the view of my brethren that costs such as were incurred here must come within those very general words, "costs incurred in the preparation of the claim."

Greer, L.J., thought that para. 7 of the special case must involve a slip. I am not myself satisfied that that is so. It says :

> The tenants did not incur any loss or expense attributable to the quitting of the holding upon or in connection with the sale or removal of their household goods. . . .

That, I think, refers to the category of disturbances under the original Act and referred to in the earlier part of sect. 12 (6). The order goes A on to say that they, however, are liable to pay the fees in question, and I read that latter part as meaning : These are the details of the expenses which the tenants claim are expenses incurred in the preparation of the claim. They do not say so ; but I read the paragraph in that way, and, if it is read in that way, then there is no need to assume that there B was any mistake in it. However, if there is any doubt, I should agree with Greer, L.J., in reading the paragraph as subject to some minor verbal alteration in order to make that meaning clear.

Subject to these observations which, to my mind, make it doubly clear that the intention of the legislature was to include this class of C costs as costs caused by the disturbance, I agree with what Greer and Slesser, L.JJ., have said.

Appeal dismissed with costs.

Solicitors : *A. J. Adams & Adams*, agents for *Coulter Hancock & Thrall*, Truro (for the appellant) ; *Robbins, Olivey & Lake*, agents for *Nalder* D *& Son*, Truro (for the respondents).

[*Reported by* E. Fuller Briscoe, Esq., *Barrister-at-Law.*]

BRITISH & FRENCH TRUST CORPORATION *v.* NEW BRUNSWICK RAILWAY CO. E

[Court of Appeal (Greer, Slesser and Scott, L.JJ.), **July 21, 22, 23, 26, November 22, 1937.**]

Money—Covenant to pay on a gold basis—Redemption of debenture—Payment of interest—Construction of bond—Surrounding circumstances. F

Estoppel—Estoppel by record—Judgment in default of defence—Judgment upon one of a series of like debentures—Identity of debentures not pleaded in previous action.

Dominions — Effect of retrospective legislation — Whether contract governed by English, Canadian, or New Brunswick law—Validity of New Brunswick G *legislation—Federal Gold Clauses Obligations Act of Canada,* 1937 (c. 37) *—Gold Clauses Act of New Brunswick,* 1937 (c. 45).

The defendants, a Canadian corporation, registered under the laws of New Brunswick, issued on Aug. 1, 1884, 6,000 first mortgage gold bonds of like amount, tenor, and date. The bonds were secured by a mortgage trust deed, and all became due on Aug. 1, 1934. The bonds H stated that on that date the defendants for value received promised " to pay to bearer or registered holder thereof £100 sterling gold coin of Great Britain of the present standard of weight and fineness at its agency in London, England, with interest thereon " at 5 per cent. per annum, payable in London or, at the holder's option, at the defendants' office in New Brunswick. The interest coupon stated that the company would pay the bearer £2 10*s*. sterling at its agency in London, England, or at its office in New Brunswick, on Aug. 1, 1934. The plaintiffs, holders of 992 such bonds, claimed in respect of each bond the sum in sterling calculated on Aug. 1, 1934, then representing the gold value of £100 on Aug. 1, 1884. The defendants contended that they were bound to pay only £100 sterling upon each bond, and interest upon the same basis. In an action between the same parties upon another of the said bonds, the plaintiffs obtained judgment on Nov. 7, 1934, upon the gold basis now claimed, the defendants not having put in any defence to that action. The statement of claim in that action did not allege that all the bonds were identical in their terms.

On Jan. 16, 1936, judgment was given in the present action in favour of the defendants. The plaintiffs appealed, but, before the appeal could be heard, the legislature of New Brunswick, on Apr. 2, 1937, and that of Canada, on Apr. 10, 1937, both passed legislation affecting gold-clause obligations :—

HELD : (i) the defendants were estopped from raising any argument about the construction of the bonds, as a contract in identical terms and between the same parties had already been construed by the court in the earlier action.

(ii) the defendants were not estopped from raising as a defence the dominion or provincial legislation, as that had been passed after delivery of judgment in the court below, and had not, therefore, been available to the defendants as a defence at the first hearing.

(iii) (*per* SCOTT, L.J.) : by virtue of the British North America Act, 1867, s. 92, and 44 Vic. (Canada), c. 42, s. 1, the Parliament of Canada was entitled to legislate in respect of the defendant company, although such parts of the defendant company's undertaking as were within Canada were situate wholly within New Brunswick. The Federal Gold Clauses Obligations Act, 1937, was therefore *intra vires* the Canadian Parliament.

(iv) although the contract was as a whole governed by Canadian law, questions as to mode of payment and as to measure of the amount of payment were to be settled by the *lex loci solutionis*, which in this case was English law.

(v) the clause in the bonds was a gold clause, and both principal and interest must be calculated on a gold basis.

Decision of HILBERY, J., ([1936] 1 All E.R. 13) *reversed.*

[**EDITORIAL NOTE.** HILBERY, J., held that there was no estoppel because each bond was a distinct contract, and the record of the previous action did not show that all the bonds were in the same terms. The Court of Appeal, however, have held that there was an estoppel since a contract in identical terms had already been construed by the courts. The Court of Appeal has followed the recent decisions upon the construction of the gold clause, and in its finding that the mode and measure of the amount of payment are to be settled by the *lex loci solutionis*.

AS TO ESTOPPEL, see HALSBURY, Hailsham Edn., Vol. 13, pp. 411, 412, paras. 466, 467 ; and FOR CASES, see DIGEST, Vol. 21, pp. 174-178, Nos. 276-297.]

Cases referred to :

(1) *Feist* v. *Société Intercommunale Belge d'Électricité*, [1934] A.C. 161 ; Digest Supp. ; 103 L.J. Ch. 41 ; 150 L.T. 41.

(2) *R.* v. *International Trustee for the Protection of Bondholders Akt.*, [1937] A.C. 500 ; [1937] 2 All E.R. 164 ; Digest Supp. ; 106 L.J.K.B. 236 ; 156 L.T. 352 ; *affirming* [1936] 3 All E.R. 407.

(3) *Brunsden* v. *Humphrey* (1884), 14 Q.B.D. 141 ; 21 Digest 207, *180* ; 53 L.J.Q.B. 476 ; 51 L.T. 529.

(4) *Workington Harbour and Dock Board* v. *Trade Indemnity Co., Ltd.* (*No.* 2), [1937] 3 All E.R. 139 ; Digest Supp.

(5) *Re Graydon, Ex p. Official Receiver*, [1896] 1 Q.B. 417 ; 42 Digest 276, *3105* ; 65 L.J.Q.B. 328 ; 74 L.T. 175.

(6) *Kingston's (Duchess) Case* (1776), 1 East, P.C. 468 ; 21 Digest 159, *213*.

(7) *Jewsbury* v. *Mummery* (1872), L.R. 8 C.P. 56 ; 21 Digest 177, *292* ; 42 L.J.C.P. 22 ; 27 L.T. 618.

(8) *Re Hilton, Ex p. March* (1892), 67 L.T. 594 ; 21 Digest 177, *293*.

(9) *Humphries* v. *Humphries*, [1910] 2 K.B. 531 ; 21 Digest 177, *294* ; 79 L.J.K.B. 919 ; 103 L.T. 14.

(10) *Cooke* v. *Rickman*, [1911] 2 K.B. 1125 ; 21 Digest 178, *295* ; 81 L.J.K.B. 38 ; 105 L.T. 896.

(11) *R.* v. *St. Pancras (Inhabitants)* (1794), Peake, 286 ; 22 Digest 282, *2681*.

(12) *Priestman* v. *Thomas* (1884), 9 P.D. 210 ; 21 Digest 168, *251* ; 53 L.J.P. 109 ; 51 L.T. 843.

(13) *Thomas* v. *Ketteriche* (1749), 1 Ves. Sen. 333 ; 23 Digest 239, *2909*.

(14) *Hoystead* v. *Taxation Comr.*, [1926] A.C. 155 ; Digest Supp. ; 94 L.J.P.C. 79 ; 134 L.T. 354.

(15) *Adelaide Electric Supply Co., Ltd.* v. *Prudential Assurance Co., Ltd.*, [1934] A.C. 122 ; Digest Supp. ; 103 L.J. Ch. 85 ; 150 L.T. 281.

(16) *Ralli Brothers* v. *Compañia Naviera Sota y Aznar*, [1920] 2 K.B. 287 ; 11 Digest 397, *699* ; 89 L.J.K.B. 999 ; 123 L.T. 375.

(17) *Mount Albert Borough Council* v. *Australasian Temperance & General Mutual Life Assurance Society, Ltd.*, [1937] 4 All E.R. 206 ; Digest Supp.

(18) *Norman* v. *Baltimore & Ohio Ry. Co.* (1935), 294 U.S. Rep. 240.

(19) *Newington* v. *Levy* (1870), L.R. 6 C.P. 180 ; 21 Digest 177, *291* ; 40 L.J.C.P. 29 ; 23 L.T. 595.

(20) *Henderson* v. *Henderson* (1843), 3 Hare, 100 ; 21 Digest 174, *276* ; 1 L.T.O.S. 410.

(21) *Serbian Loans Case* (1929), Permanent Court of International Justice, Series A, No. 14, p. 5.

(22) *Jacobs* v. *Crédit Lyonnais* (1884), 12 Q.B.D. 589 ; 11 Digest 396, *688* ; 53 L.J.Q.B. 156 ; 50 L.T. 194.

(23) *Gibbs & Sons* v. *Société Industrielle et Commerciale des Métaux* (1890), 25 Q.B.D. 399 ; 11 Digest 388, *642* ; 59 L.J.Q.B. 510 ; 63 L.T. 503.

(24) *Chatenay* v. *Brazilian Submarine Telegraph Co.*, [1891] 1 Q.B. 79 ; 17 Digest 331, *1424* ; 60 L.J.Q.B. 295 ; 63 L.T. 739.

(25) *Benaim & Co.* v. *Debono*, [1924] A.C. 514 ; Digest Supp. ; 93 L.J.P.C. 133 ; 131 L.T. 1.

(26) *Gray* v. *Pearson* (1870), L.R. 5 C.P. 568 ; 8 Digest 520, *100* ; 23 L.T. 416.

(27) *St. Pierre* v. *South American Stores (Gath & Chaves), Ltd., and Chilean Stores (Gath & Chaves), Ltd.*, [1937] 3 All E.R. 349 ; Digest Supp.

(28) *Jones* v. *Lewis*, [1919] 1 K.B. 328 ; 21 Digest 161, *219* ; 88 L.J.K.B. 657 120 L.T. 200.

(29) *Montgomery* v. *Russell* (1894), 11 T.L.R. 112.

(30) *Grant* v. *Knaresborough Urban Council*, [1928] Ch. 310 ; Digest Supp. ; 97 L.J. Ch. 106 ; 138 L.T. 488.

(31) *Ker* v. *Williams* (1885), 29 Sol. Jo. 681.

(32) *Re South American & Mexican Co., Ex p. Bank of England*, [1895] 1 Ch. 37 ; 10 Digest 926, *6349* ; 64 L.J. Ch. 189 ; 71 L.T. 594.

(33) *Perry's Case* (1935), 294 U.S. 307.

(34) *Laprairie Common Corporation* v. *Compagnie de Jésus*, [1921] 1 A.C. 314 ; 124 L.T. 482.

(35) *Green* v. *Weatherill*, [1929] 2 Ch. 213 ; Digest Supp. ; 98 L.J. Ch. 369 ; 142 L.T. 216.

(36) *Lemm* v. *Mitchell*, [1912] A.C. 400 ; 42 Digest 776, *2047* ; 81 L.J.P.C. 173 ; 106 L.T. 359.

(37) *Guaranty Trust Co. of New York* v. *Hannay & Co.*, [1918] 2 K.B. 623; 30 Digest 202, *718*; 87 L.J.K.B. 1223; 119 L.T. 321.

(38) *British South Africa Co.* v. *De Beers Consolidated Mines, Ltd.*, [1910] 2 Ch. 502; 17 Digest 255, *682*; 80 L.J. Ch. 65; 103 L.T. 4; *revsd. on other grounds*, [1912] A.C. 52.

(39) *Irish Land Comr.* v. *Ryan*, [1900] 2 I.R. 565; 21 Digest 146, case *s*.

A APPEAL from a decision of HILBERY, J., dated Jan. 16, 1936, and reported in [1936] 1 All E.R. 13.

H. A. H. Christie, K.C., and *Colin H. Pearson* for the appellants.

F. R. Evershed, K.C., *Valentine Holmes* and *J. Platts Mills* for the B respondents.

Christie, K.C.: The law has now been clarified by the House of Lords decision in *Feist* v. *Société Intercommunale Belge d'Électricité* (1). Once the existence of a gold clause is established, the court will give effect to it. Its purpose is to provide stabilisation. The court will not look C at *minutiæ*, but will consider the general tenor of such a clause. [Counsel referred to *Serbian Loans Case* (21) and *R.* v. *International Trustee for the Protection of Bondholders Aktiengesellschaft* (2).]

Evershed, K.C.: There is no estoppel in this case; each bond is a separate cause of action. In the first action, the defendants did not D appear. The court ought not to give a declaration in a case in which the other side of a question was never argued. [Counsel referred to *Workington Harbour and Dock Board* v. *Trade Indemnity Co., Ltd.* (*No.* 2) (4).] In *Brunsden* v. *Humphrey* (3), both causes of action were negligence. These actions were brought on different documents, though they E were in the same terms. To some extent this is a matter of discretion for the court. The defendant company is domiciled in Canada. No prudent company would fight an action over here on one single bond. It is unjust if a plaintiff subsequently gets a large number of bonds and then relies upon a judgment in an undefended case. Here both parties F want the point to be decided, and it is not an abuse of the process of the court.

The court must give to the language used its plain and natural meaning. If a debt can be settled by the payment of a hundred golden sovereigns, it can be settled by paying the legal tender for that amount. This is G not a contract to pay in specie or goods, but in currency. The words in question have a literal meaning; they refer to a particular type of currency—gold coins. There must be some justification for straining language. A meaning other than the natural one may be given where the context or the surrounding circumstances, or both, require it. In H the case of *Feist* v. *Société Intercommunale Belge d'Électricité* (1), neither party intended that payment of principal or interest should actually be in gold coin; both parties expected that Great Britain would go off the gold standard. There are no such circumstances here to warrant a departure from the natural meaning of the words used, and, in the absence thereof, the age-long principle must apply, and the words be given their natural meaning. [Counsel referred to *Gray* v. *Pearson* (26), *St. Pierre* v. *South American Stores* (*Gath & Chaves*), *Ltd.* (27), *Jones* v. *Lewis* (28), *Montgomery* v. *Russell* (29), *Grant* v. *Knaresborough Urban Council* (30), *Ker* v. *Williams* (31), *Re South American & Mexican Co., Ex p. Bank of England* (32), *Norman* v. *Baltimore & Ohio Ry. Co.* (18), *Perry's Case* (33), and *Serbian Loans Case* (21).] A

It is submitted that this contract is governed by Canadian law. Where one is dealing with an old document, one is entitled to look at an Act which has been passed subsequently and which deals with the same subject-matter: *Laprairie Common Corpn.* v. *Compagnie de Jésus* (34). [Counsel referred to Canadian statutes, 1881 (c. 42); 1890 (c. 71), s. 3; the B Federal Gold Clauses Obligations Act, 1937 (c. 37); and to the New Brunswick statutes, 1937 (c. 25) (amending the Currency Reform Act, 1927 (c. 140)), and the Gold Clauses Act, 1937 (c. 45).] By this recent legislation, if judgment is obtained in a foreign court for the larger amount, the amount paid on execution in New Brunswick will be the C lesser amount. The place of performance of this contract is London, but that does not affect the proper law to be applied to the contract. That is settled by what determines the quantum of obligation. It is a question of the presumed intention of the parties. The defendant company is a Canadian institution, not a New Brunswick one; the D British North America Act, 1867, s. 92, says that it is for the general advantage of Canada, and that Act was kept alive by the Statute of Westminster, 1931, s. 7 (1). On the face of it, the bond refers to the laws of New Brunswick; its entire phraseology is transatlantic.

Christie, K.C., in reply: A party may not litigate the same cause of action E twice: *Kingston's* (*Duchess*) *Case* (6). The construction of the bond was the essence of the matter in both cases. It is clear that a decision as to one instalment of rent is an estoppel in an action for a subsequent instalment: *Humphries* v. *Humphries* (9). So also in the case of royalties due on a patent: *Re Graydon, Ex p. Official Receiver* (5). The F doctrine of *res judicata* is not a technical point, but a matter of principle: *Green* v. *Weatherill* (35). The contracts here are in identical terms; it is immaterial that the bonds are different pieces of paper. It is submitted that the court could make the declaration sought, as otherwise a defendant could defeat a plaintiff merely by staying away. [Counsel G referred to *Hoystead* v. *Taxation Comr.* (14), *Lemm* v. *Mitchell* (36), and *Guaranty Trust Co. of New York* v. *Hannay & Co.* (37).]

It is submitted that the law of the whole contract is English. The whole of the performance on both sides is to take place in London. The bonds were not issued wholly in New Brunswick, but were delivered to H various purchasers, largely in London. The contract was not complete until a bond was delivered to a purchaser and had been paid for. It is plain that the parties intended to submit themselves to English law. The bonds were issued in London, and the money obtained came from London. The new Canadian legislation does not deal with interpretation

at all, but only with the mode of performance, and, if that is to be according to English law, then the Canadian Acts do not apply. Sect. 6 of the new Act does not purport to make existing gold clauses void. If it did, the plaintiff could not recover anything at all, as the only covenant to repay is contained in the gold clause. English law, not
A Canadian, must be applied in order to determine what is the proper law to apply to the contract. [Counsel referred to *British South Africa Co.* v. *De Beers Consolidated Mines, Ltd.* (38), *Chatenay* v. *Brazilian Submarine Telegraph Co.* (24), *Benaim & Co.* v. *Debono* (25), and *Adelaide Electric Supply Co., Ltd.* v. *Prudential Assurance Co., Ltd.* (15).]

B It is submitted that the New Brunswick Act is *ultra vires.*

Evershed, K.C., replying on law: In the first action, looking at the record—and, in the case of a judgment by default, that is all one can look at—can it be said that the same matters were being litigated? In *Humphries* v. *Humphries* (9) the same subject-matter had already
C been litigated. Unless the bonds are in identical terms—and there is no evidence that they are—the same issues have not been determined. In any event, the *res judicata* point affects only matters previously argued and does not extend to the fresh legislation. [Counsel referred to *Lemm* v. *Mitchell* (36), *Adelaide Electric Supply Co., Ltd.* v. *Prudential Assur-*
D *ance Co., Ltd.* (15), *Serbian Loans Case* (21), *Jacobs* v. *Crédit Lyonnais* (22), *Ralli Brothers* v. *Compañia Naviera Sota y Aznar* (16), and *Irish Land Comr.* v. *Ryan* (39).]

GREER, L.J.: This is an appeal by the plaintiffs from an order of
E HILBERY, J., in favour of the defendants.

The dispute arises out of what is called a gold clause in a contract contained in certain bonds issued by the defendant company in Canada on the terms of a trust deed, the amount of the bonds being payable in London. The judge held that the defendants were not liable to pay
F off the bonds in London upon the terms of what is called the gold clause. The bonds in question were issued in a series consisting of 6,000 in number, and were issued on Aug. 1, 1884.

It was contended by the appellants, in the first place, that the defendants were estopped from relying on the contentions on which they
G relied in their defence, by reason of the judgment which was obtained against them in an action on one of the bonds commenced on Mar. 19, 1935, in which judgment there was included a declaration that, upon the true construction of the bond, the plaintiffs were entitled as holders thereof to receive from the defendants in respect of each such bond by
H way of principal due thereunder on Aug. 1, 1934, such a sum as represented the price in London in sterling (calculated as on that day) of 12,327.447 grains of gold of the standard of fineness specified in the Coinage Act, 1870, Sched. I, and by way of the half-yearly interest due thereunder on the said Aug. 1, 1934, a sum equal to 2½ per cent. of the amount specified above, less income tax.

The respondents contended that there was no estoppel, inasmuch as the cause of action on each bond sued on was different from the cause of action on the first bond. They further contended that, on the assumption that there was no estoppel, the decision of the House of Lords in *Feist* v. *Société Intercommunale Belge d'Électricité* (1) and in *R.* v. *International Trustee for the Protection of Bondholders Akt.* (2) did not apply A to the question of the defendants' liability on the bond sued on in the present case.

In my judgment, for reasons which I will hereafter state, I think that the defendants were estopped from raising the question that, on the true construction of the gold clause, they were not liable thereunder, but that B they were not estopped from raising the defence they raised by amendment based on the Canadian statutes passed after the hearing of the first action on one of the bonds.

I think that we are bound by decisions of the House of Lords to give effect to the words of the bond relating to the payment of the bonds in C sterling equivalent to the measure stated in the gold clause. I think that the law of England governed the transaction, both as to the mode of payment and as to the measure of the amount of payment. I will deal with these questions in detail; but I have thought it convenient to state first my decision with regard to the contentions in the appeal. D With regard to the plea of estoppel, two decisions were relied on by Mr. Evershed on behalf of the respondents, *Brunsden* v. *Humphrey* (3) and *Workington Harbour and Dock Board* v. *Trade Indemnity Co., Ltd.* (*No.* 2) (4), both in the Court of Appeal.

These two authorities are, in my judgment, insufficient to support E his argument. They were concerned with the first proposition in the law of estoppel by record, that no one ought to be vexed twice with the same cause of action. If a plaintiff brings an action for breach of contract, he must be held to the result of his action. If he has failed to recover all the damages to which he is entitled, he cannot bring a F new action to recover damages based on the same breach of contract. This would be twice vexing the defendant with the same cause of action. If, however, he can affirm that his second action is for an entirely different cause of action, he is not estopped from bringing his second action. It has been held that trespass to goods and trespass to the person are G different causes of action, though they may both be based on negligence. In these cases, a finding of damage in the action for trespass to the person does not bar a second action for damages for trespass to goods: *Brunsden* v. *Humphrey* (3) and *Re Graydon, Ex p. Official Receiver* (5).

It is pointed out by the author of an excellent book on *res judicata*: H

> The rule of estoppel by *res judicata*, which, like that of estoppel by representation, is a rule of evidence, may be thus stated. Where a final judicial decision has been pronounced by either an English, or (with certain exceptions) a foreign, judicial tribunal of competent jurisdiction over the parties to, and the subject-matter of, the litigation, any party or privy to such litigation, as against any other party or privy thereto, and, in the case of a decision *in rem*, any person whatsoever, as against any other person, is estopped in any subsequent litigation from disputing

> or questioning such decision on the merits, whether it be used for the foundation of an action, or relied upon as a bar to any claim, indictment or complaint, or to any affirmative defence, case, or allegation, if, but not unless, the party interested raises the point of estoppel at the proper time and in the proper manner. Any party who is desirous of setting up *res judicata* by way of estoppel, whether he is relying on such *res judicata* as a bar to his opponent's claim or as the foundation of his own, and who has taken the preliminary steps required in order to qualify him for that purpose, must establish all the constituent elements of an estoppel A of this description, as already indicated in the general proposition enunciated at the commencement of this chapter. That is to say, the burden is on him of establishing (except as to any of them which may be expressly or impliedly admitted) each and every of the following: (i) that the alleged judicial decision was what in law is deemed such; (ii) that the particular judicial decision relied upon was in fact pronounced, as alleged; (iii) that the judicial tribunal pronouncing the decision had competent jurisdiction in that behalf; (iv) that the judicial decision B was final; (v) [this is the important part of the matter] that the judicial decision was, or involved, a determination of the same question as that sought to be controverted in the litigation in which the estoppel is raised: (vi) that the parties to the judicial decision, or their privies, were the same persons as the parties to the proceeding in which the estoppel is raised, or their privies, or that the decision was conclusive *in rem.* In the exercise of this inherent authority, the courts have not infrequently intervened to prevent the perversion to base uses of a bare right to reopen matters already litigated, in cases where no estoppel *per rem judicatam*, or, as the case may C be, no bar of "former recovery," has been strictly established.

These statements of the law agree with, and are in effect the same as, those stated in the notes to the *Duchess of Kingston's Case* (6), in 2 SMITH'S LEADING CASES, 13th Edn., p. 680:

> D Where an executor, a defendant, in support of a plea of *non devastavit*, sought to give evidence of facts, which, if a defence at all, might have been given in evidence under his plea of *plene administravit* in a previous action against him by the same plaintiff, in which judgment was given against him, he was held estopped: *Jewsbury* v. *Mummery* (7); see also *Ex p. March* (8).

In *Humphries* v. *Humphries* (9) the defendant in an action for recovery E of rent under an oral agreement for a tenancy was held precluded from pleading the Statute of Frauds, because, in a previous action for recovery of rent under the same agreement, she had omitted to plead the statute. This case was followed in *Cooke* v. *Rickman* (10), where it was held that the defendant could not set up as a defence the absence of considera- F tion for an agreement to pay rent, because she had omitted to set up that defence in a previous action for rent under the same agreement.

It is not necessary that the point on which it is sought to estop should have been the only one in issue on the previous occasion; it is enough if it be one which must have been decided: *R.* v. *St. Pancras* G (*Inhabitants*) (11), *Priestman* v. *Thomas* (12), and *Thomas* v. *Ketteriche* (13). In *Hoystead* v. *Taxation Comr.* (14) the appellants, who were six beneficiaries under a will of real estate, objected to their assessment to land tax made by the respondent for the year 1919-1920, on the ground that they were taxable as "joint owners" and were holders of "original H shares" in the land, within the meaning of the Land Tax Assessment Act. This objection was transmitted for decision to the High Court of Australia, where the sole point argued by the respondent was that the appellants were not holders of "original shares," it being assumed and admitted that they were "joint owners." This point was determined against the respondent, and the appellants' objection was upheld by the court. In the following year, however, the respondent again claimed to enforce the assessment which had thus been rejected, alleging that the appellants were not "joint owners" within the meaning of the statute. It was held by the Privy Council that he was estopped from raising the point by his admission in the former proceedings. Lord Shaw said, at p. 165 :

> In the opinion of their Lordships, it is settled, first, that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started, with a view of obtaining another judgment upon a different assumption of fact ; secondly, the same principle applies not only to an erroneous admission of a fundamental fact, but to an erroneous assumption as to the legal quality of that fact. Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted, litigation would have no end, except when legal ingenuity is exhausted.

In the action on the first bond, when the respondents did not appear at the hearing of the motion for judgment, the bondholders claimed a declaration, and the court made a declaration in the following words :

> It is this day adjudged and declared that upon the true construction of the bond referred to in the statement of claim the plaintiffs are entitled as holders thereof to receive from the defendants (*a*) by way of the principal due thereunder on Aug. 1, 1934, such sum as represents the price in London in sterling (calculated as on that day) of 12,327.447 grains of gold of the standard of fineness specified in the Coinage Act, 1870, Sched. I, and (*b*) by way of the half-yearly interest due thereunder on the said Aug. 1, 1934, a sum equal to 2½ per cent. of the amount specified in (*a*) above.

A judgment by consent or in default operates as an estoppel to the same extent as it would so operate if the action had been tried and a decision given after trial to the same effect as the decision given on motion by default : see r. 38 as stated in the late Mr. Spencer Bower's book above referred to. The author states the law as to default judgments as follows :

> A judgment or order by default is *prima facie* as much a judicial decision in favour of the plaintiff as any other judgment or order, whether the default of the defendant was in appearance to the writ, or in pleading, or in appearance at the trial or hearing, or in prosecution of, or resistance to, an appeal. Conversely, where a defendant has pleaded a plea in bar, which, instead of replying to it, the plaintiff confesses, and taxes his costs, or where a defendant has paid money into court which the plaintiff takes out in satisfaction, the result is, in either case, deemed equivalent to a decision in favour of the defendant, which the plaintiff is estopped from afterwards disputing.

The bond in the present action and the trust deed and the mortgage were in exactly the same terms as in the action on the first bond, in which judgment was given as above stated.

The contentions of Mr. Evershed relating to the meaning of the contract would, if well founded, have afforded an answer to the plaintiffs' claim for a declaration in the first action. If the case had been heard and decided against these contentions, there would clearly have been an estoppel. There is equally an estoppel in the case of a judgment given in their absence as to all defences which could have been raised by the respondents, but which they refrained from raising by allowing judgment to go in their absence. The judgment must be treated as having determined all the matters stated in the declaration above set out. There can, of course, be no estoppel with regard to the effect of the Canadian statutes, which had not become law at the time of the motion for judgment in the first action. The respondents are, in my judgment, estopped, except as above stated, from raising any defence that would have entitled them to judgment in the first action, whether such defence be one of fact or of law. An illustration may be useful. A claim is made for a quarter's rent alleged to be due under the terms of a lease. In order to decide the cause, the court has to determine the construction of a clause in the lease. A further quarter's rent becomes due. The landlord's claim thereto is clearly a new cause of action ; but both parties would be held to be estopped from disputing the construction put by the court in the first action on the terms of the lease.

I proceed to state my views on the defendants' second contention. In *Feist's* case (1), which originally came before FARWELL, J., the judge hesitated before giving a decision against the gold clause, because in doing so he would be giving no effect to the express words of the clause. The House of Lords felt the same difficulty. As I read the opinion of LORD RUSSELL OF KILLOWEN, he was impressed with the same difficulty, but found himself able to give judgment in favour of the plaintiffs by construing the bond so as to give a meaning to the words of the gold clause. As the estoppel does not extend to the case raised by the amendment, it is necessary to consider the main argument of Mr. Evershed for the respondents, that the proper law to determine the measure of payment in sterling is the law of Canada, the *lex loci contractus*, and not the law of the country in which payment is demanded. This is a question of considerable difficulty, by reason of conflicting decisions in the House of Lords and in the Privy Council.

In *Feist's* case (1) the proper law of the contract was expressly determined by a clause in the contract, as one of the indorsed conditions on the contract provided that the bond should be construed and the rights of the parties regulated according to the law of England, as a contract made and according to the terms thereof to be performed in England. It was, accordingly, unnecessary to decide what would have been the proper law of the contract in the absence of the condition mentioned above. Nor was it necessary to decide the point in *R.* v *International Trustee for the Protection of Bondholders Akt.* (2), because in that case the *locus contractus* and the *locus solutionis* were the same. But the question whether the *lex loci contractus* or the *lex loci solutionis* applied to the measure of payment did arise in *Adelaide Electric Supply Co., Ltd.* v. *Prudential Assurance Co., Ltd.* (15), where it was decided in the leading opinion of LORD WRIGHT, with which LORD ATKIN expressed his agreement, that, where there is a difference between the *lex loci contractus* and the *lex loci solutionis* as to the measure of the amount of dividend payable on preference shares, this question fell to be determined by the *lex loci solutionis*, and not by the *lex loci contractus*, even though the *lex loci contractus* might be the proper law for the determination for the meaning of the contract. Lord Wright said, at p. 151:

> It is established that *prima facie*, whatever is the proper law of a contract regarded as a whole, the law of the place of performance should be applied in respect of any particular obligation which is performable in a particular country other than the country of the proper law of the contract. To refer only to one authority, it was held in *Ralli Brothers* v. *Compañia Naviera Sota y Aznar* (16) that freight which under an English charterparty was payable at Barcelona was payable only to the extent of a proportion, being all that was permissible under the Spanish law, the law of the place of performance, since that law had forbidden payment of more than a maximum rate of freight, substantially less than the charterparty rate. Lord Warrington, at p. 295, quoted with approval from Dicey on Conflict of Laws, 2nd Edn., at p. 553: "When the contract is made in one country, and is to be performed either wholly or partly in another, then the proper law of the contract, especially as to the mode of performance, may be presumed to be the law of the country where the performance is to take place."

As the opinion of Lord Wright must be taken to represent the views of the majority of the Lords who heard the appeal in the *Adelaide* case (15), we are bound to hold that the measure of payment falls to be determined by the law of the place of performance, which in the present case is the law of England, as stated in the decision of the House of Lords in *Feist's* case (1).

Since the hearing, my attention has been directed to the decision of the Privy Council in *Mount Albert Borough Council* v. *Australasian Temperance & General Mutual Life Assurance Society, Ltd.* (17), delivered on behalf of the Board by Lord Wright. The headnote in that case is:

> The obligation of the appellants, a New Zealand borough council, to pay in Melbourne, Australia, the interest on debentures issued by the appellants in New Zealand, pursuant to an agreement of Sept. 4, 1926, as security for a loan from the respondents, a life assurance company incorporated in Victoria and carrying on business in Australia and New Zealand, was not affected by the Victorian Financial Emergency Acts of 1931 and 1932, which provided for reductions in interest payments on mortgages and other securities. The proper law of the contract was in the circumstances the law of New Zealand, and the Financial Emergency Acts of Victoria, which were of limited territorial application, did not apply to the appellants' debentures or to the interest payable under them, or entitle the appellants to rely on them in the New Zealand courts with regard to the debentures and interest coupons. Those Acts, therefore, did not furnish a defence to a claim by the respondents for payment of interest in full at the agreed rate. The New Zealand courts were not required to treat the Acts of the New Zealand legislature as varied by the legislature of another state.

I am unable to reconcile the decision of the Privy Council with the decision in the *Adelaide* case (15), though Lord Wright appears to have been able to do so.

In my judgment, we are bound to hold in the present case that the law applicable to the measure of sterling payable was English law, and, therefore, bound to follow *Feist's* case (1), and allow the appeal with costs here and below.

Slesser, L.J.: The facts of this case have been fully stated by Greer and Scott, L.JJ., in their judgments, which I have read, and I need not state them.

When Hilbery, J., gave judgment for the defendants in this case on

Jan. 16, 1936, he took the view that the whole of the bond was impressed with the character of a bond for the payment of £100 sterling, and distinguished the case from that of *Feist* v. *Société Intercommunale Belge d'Électricité* (1), on the ground that the construction which led LORD RUSSELL in *Feist's* case (1) to give to the bond the meaning which he did (namely, that the true meaning of the gold clause was to oblige the payment of a sum equal to the gold value expressed in the contract) was not applicable to the present case.

Since the judgment of HILBERY, J., however, this court, in *R. v. International Trustee for the Protection of Bondholders Akt.* (2), on language of a deed similar in substance to that in the present case, applied the *Feist* principle (1)—a view which was subsequently approved by the House of Lords in terms so general as to cover this case. LORD WRIGHT, in delivering the opinion of this court, said, at p. 511 :

> The governing decision must be that of the House of Lords in *Feist's* case (1).

The same principles of construction have been applied by the Supreme Court of the United States in the case of *Norman* v. *Baltimore & Ohio Ry. Co.* (18), and in other cases before that court. The effect of *Feist's* case (1) is to construe the clauses of the obligation as if they ran : " pay . . . in sterling a sum equal to the value of £100, if paid in gold coin of the United Kingdom of or equal to the standard weight and fineness existing on a certain date." LORD WRIGHT deals with the fact that BRANSON, J., in the *International Trustee* case (2), relies on the circumstances which distinguished the case from that of *Feist* (1), but points out that the Court of Appeal could find no substantial difference from *Feist's* case (1), and, consequently, I think it is now clear that the grounds upon which HILBERY, J., gave judgment for the defendants in this case cannot be supported.

In the recent case of *Mount Albert Borough Council* v. *Australasian Temperance & General Mutual Life Assurance Society, Ltd.* (17), a debenture was secured upon real property in New Zealand, a New Zealand local authority being the borrower. Payment was to be made, both as to principal and interest, at the Bank of New Zealand, Melbourne, Australia. By Australian legislation, the mortgage, among other securities, was to be construed and to take effect as if it were a term " that the interest should be reduced at a rate equivalent to 4*s.* 6*d.* for every £1 of such interest " (Victorian Financial Emergency Act, 1931, as amended by Victorian Financial Emergency (Mortgages) Act, 1932). The Judicial Committee of the Privy Council, in a judgment delivered by LORD WRIGHT, decided that the contract as a whole imposed obligations which were to be governed by New Zealand law. LORD WRIGHT distinguished *Adelaide Electric Supply Co., Ltd.* v. *Prudential Assurance Co., Ltd.* (15), pointing out that in the latter case the House of Lords was not concerned with the question of the substance of the obligation, but only with performance of that obligation with regard to the particular matter of the currency in which payment was to be made, and, as I read his judgment, their Lordships confined their judgment in the *Mount Albert* case (17), so far as concerns this present case, to the finding that New Zealand law applied to the substance of the obligation, and that the Australian legislation, which sought to alter that substance by altering the rate of interest and in other ways, had no application to the contract. In those circumstances, I do not think that anything in the *Mount* A *Albert* case (17) prevents me from arriving at the conclusion in the present case that the law determining the matter of the currency in which the obligation is to be discharged is English, having regard to the place of payment agreed between the parties and the medium of payment, namely, English pounds. B

In my view, the legislation here invoked, the Canadian Gold Clauses Act, 1937, does not, unlike the Australian case mentioned, affect the substantial obligations between the parties, which, in the present case, are clearly governed by Canadian law. The legislation is concerned only with the mode and measure of discharge of obligations (see sects. 3, C 4 and 5), and, as these matters were, in my opinion, intended by the parties to be governed by English law, the *lex solutionis*, the Canadian legislation, cannot affect them. There is nothing, therefore, to prevent the application here of principles to be derived from *Feist's* case (1) and from the *International Trustee* case (2). D

This conclusion is sufficient to decide this case in favour of the plaintiffs; but the plaintiffs, however, have taken the further point, in their amended reply, that the defendants are estopped from raising in this action that they are entitled to discharge their obligation by tendering to the holders £100 sterling for each bond with appropriate interest in legal tender for E such a sum in England at the date of payment. The point, apart from the defendants' amendment, would be good, for the reasons mentioned by Greer, L.J., but, as regards the effect of the Canadian legislation, cannot, I think, be sustained. While accepting the general rules of estoppel as stated by Greer, L.J., when judgment was here given by F default, the legislation in Canada and New Brunswick, which is now relied upon to distinguish this case from the earlier case, had not been passed, and therefore the decision in the judgment by default did not involve the determination of all the same issues as those sought to be decided in the present litigation in which the estoppel is now raised. G At the time of the default judgment, the question now in issue and argued by leave of this court—namely, whether, if Canadian law be rightly applied to the whole contract, the new legislation of the Dominion of Canada or that of New Brunswick now entitles the defendants to discharge their obligation in the manner contended for by the defendants H —could not be considered. That is to say, assuming that the declaration of Nov. 7, 1934, could not be impeached and extends to cover all these bonds, it is still open to the defendants to say that they will raise new matter, namely, that legislation not then existent, on the hypothesis that Canadian law applies, now governs the case. That matter is only *res judicata* which might have been controverted at the time of the judgment, and the Canadian and New Brunswick legislation of 1937 was not such: see BRAMWELL, B., in *Newington* v. *Levy* (19), at p. 189. The principle of estoppel extends to any point, whether of assumption or of admission, which was in substance the ratio of and fundamental A to the earlier decision: *Hoystead* v. *Taxation Comr.* (14), at p. 170. In *Henderson* v. *Henderson* (20), WIGRAM, V.-C., says, at p. 115:

> that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect B of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case.

For these reasons, though I do not think it necessary to decide the matter, as the amended defence fails, I think that it was open for the C defendants to raise the case now appearing on their pleadings, but, for the reasons I have earlier stated, I think that this appeal succeeds.

SCOTT, L.J.: This action was brought for the purpose of determining the correct measure of the defendant company's debt for principal and D interest upon 992 5 per cent. first mortgage gold bonds, payable to bearer, part of a series of 6,000 £100 gold bonds issued by the defendant company in 1884, all in identical form save for their identification numbers. The series contained an option of registration, but that option was not exercised in regard to the bonds in question, and is irrelevant E to this appeal. The whole series finally matured for payment of principal and last interest coupon on Aug. 1, 1934.

The plaintiffs are an English investment company, the registered office of which is in London. They bought the 992 bonds in question on Aug. 15, 1934, that is, after the bonds had become due for payment. F At that date, the plaintiffs already held some bonds of the defendant company, of which I will speak later.

The defendant company is a Canadian corporation registered under the laws of New Brunswick, Canada. It works a railway, situate partly in New Brunswick and partly in the state of Maine, United States of G America. It owns the Canadian portion, and leases the portion in Maine. It owns also a large area of land in New Brunswick outside the line of the railway. In 1881, the company sold this land to a lumber company, but in 1884 they bought it back, and issued the £600,000 worth of sterling gold bonds in question, in order to carry out the terms H of their contract of purchase. One of those terms was that the railway company would assume liability for £513,000 worth of bonds already issued by the land company. The holders of the land bonds were invited to exchange their £513,000 of land bonds for the defendant company's new gold bonds, and all did so. The balance of 87 bonds was placed through London stockbrokers.

The dispute upon which the present action turns is a frequent one, in these days of depreciated currencies, upon a contract containing a gold clause. Is the borrower entitled to get a full discharge by paying the nominal amount of currency called for by the contract, however much that payment may fall short of the gold value of his original undertaking at the date of the contract, or is the lender entitled to be paid such larger amount of the currency as will make the gold value of the payment equal to the gold value of the borrower's promise on the day he made it ? In other words, shortly stated, is the material provision a "gold value clause" ? Does the clause constitute a fixed measure of the obligor's promise in terms of gold ? That question is one of interpretation of the written document, and is the first issue in this appeal. There are two other main issues. The second issue is one of estoppel by judgment. It is raised by a replication in the original reply to the effect that, even if the plaintiffs' interpretation of the gold clause is erroneous, it is none the less binding upon the defendants, because the plaintiffs in 1934 obtained a judgment against the defendants on another one of this very issue of bonds declaring that that is the proper interpretation of the bond.

The third issue turns on an answer by the respondents, set up in this court for the first time by leave of this court more than a year after the judgment from which this appeal is brought had been pronounced and appeal entered. The respondents are not to blame for not raising it earlier, because it arises out of new Canadian legislation only passed at a date later than that of the apppeal being entered in this court, namely, Apr., 1937. The defendants by their amended plea, para. 5 (*a*), inserted by our leave, allege that this new legislation has *ex post facto* exonerated them from the obligation, if any, of the gold clause in the bonds. This, in my view, is the really difficult issue in the appeal. There is nominally a further question by a consequential amendment of the reply alleging that the estoppel by judgment extends to the new legislation ; but, as that defence could not have been raised in the first action, I think it is obvious that the estoppel could not touch it, and I need not refer to this point again. The issue of interpretation is not quite simple, but, in my view, it is really concluded in the plaintiffs' favour by the decisions of the House of Lords in 1934 and 1937 to which I shall refer presently.

Each bond was an elaborately engraved document, described on its face as a "first mortgage gold bond" in large white letters on a black ground, whilst slightly above, to right and left, was an ornamental black star containing "£100" in large white figures and the word "sterling" in small letters. This latter description was also engraved in huge white shaded figures and letters across the face of the document. The first and main clause of the bond was as follows :

> The New Brunswick Railway Co., for value received, hereby promises to pay to the bearer or registered holder hereof, on Aug. 1, 1934, the sum of £100 sterling gold coin of Great Britain, of the present standard of weight and fineness, at its agency in the city of London, England, with interest thereon at the rate of £5

sterling per centum, per annum, payable semi-annually on Feb. 1 and Aug. 1 in each year, in the said city of London or, at the option of the holder, at the office of the company in New Brunswick, on presentation and surrender of the interest warrants or coupons hereto annexed as they severally become due.

Then followed a clause giving the holder the benefit of the first mortgage or deed of trust of even date as a security :

covering the entire railway of the said company and all its land and territory, rolling stock, equipment, rights, franchises, easements, privileges and appurtenances . . . [and also] the benefit to be derived from a sinking fund to be appropriated, derived and set apart from the sale of the lands of the said railway company for the redemption of said issue of bonds, at the time and in the manner in said mortgage or deed of trust specified.

On the statement of claim and defence as originally delivered, the only issue raised was the proper interpretation of the gold clause. The plaintiffs' reply raised the issue of estoppel. It is convenient to state here the point of the alleged estoppel, because the plaintiffs in the present action are seeking to put on the bonds exactly the same interpretation as that which they sought to put on them in the action of 1934. On what exact date the plaintiffs acquired Bond No. 3,300, upon which the former action was brought, was not in evidence, except that it was before Aug. 1, 1934. The writ in that action was issued in the King's Bench Division on Aug. 20, 1934, and was indorsed with the following claims :

(1). A declaration that upon the true construction of a first mortgage gold bond numbered 3,300 and issued by the defendants under date Aug. 1, 1884, the plaintiffs are entitled as the holders thereof to receive from the defendants (*a*) by way of the principal due thereunder on Aug. 1, 1934, such a sum as represents the price in London in sterling (calculated as on that day) of 12,327.447 grains of gold of the standard of fineness specified in the Coinage Act, 1870, Sched. I, and (*b*) by way of the half-yearly interest due thereunder on the said Aug. 1, 1934, a sum equal to 2½ per cent. of the amount specified in (*a*) above, less income-tax. (2). Payment of the sums due to the plaintiffs on the footing of the said declaration, with interest. (3). Alternatively to (1) and (2), damages for breach of the defendants' promise contained in the said bond to pay to the plaintiffs as holders thereof, on Aug. 1, 1934, the sum of £100 sterling gold coin of Great Britain of the standard weight and fineness existing on Aug. 1, 1884, together with half-yearly interest thereon at the rate of £5 sterling per cent. per annum. (4). Further or other relief. (5). Costs.

Those claims are identical with the claims in the present action. Whether the defendant company entered an appearance or not, I am not sure, but, at any rate, a statement of claim was delivered on Oct. 13, 1934, and to this the defendants made default and delivered no defence. By the statement of claim in that action, the plaintiffs said that they sued as holders of the bond as a bearer bond. They referred in para. 3 to the full terms of the bond and coupons, and also to the " first mortgage or deed of trust of even date therewith made . . . for the purpose of securing the series," and in para. 4 they alleged presentation on Aug. 1, 1934, by the plaintiffs, as bearers, of the bond and last interest coupon :

claiming payment of a sum calculated in the manner set out in the declaration prayed for below or alternatively payment of the sum of £100 sterling with the half-yearly interest due thereon in current gold coin of Great Britain.

Paras. 5 and 6 were as follow :

(5) The defendants, however, by their said agents refused and still refuse in breach

> of the contract contained in the said bond to admit the plaintiffs' said claim or to pay the plaintiffs accordingly, and contend that they are entitled to discharge their obligations under the said bond by tendering to the plaintiffs the sum of £100 sterling together with interest (less income tax) at the rate of 5 per cent. per annum thereon in whatever may be legal tender for such sums in England at the date of payment. (6). The plaintiffs have suffered damage from the defendants' breach of contract set out above. The standard of weight and fineness of the gold coin of Great Britain has at all material times been that prescribed by the Coinage Act, 1870, Sched. I.

On Oct. 29, 1934, the defendants having then made default in delivery of their defence, the plaintiffs filed a notice of motion for judgment. On Nov. 7, the motion came on, and, no one appearing for the defendants, a declaratory judgment was given for the plaintiffs as prayed.

On Mar. 15, 1935, the plaintiffs presented the 992 bonds, with final interest coupons at the defendant company's agency in London, advancing the same claims in respect of the 992 bonds as those they had successfully advanced on the single Bond No. 3,300, that is, such a sum in sterling as on the day of maturity would give the equivalent of the gold contents of the pound sterling as fixed by the English Currency Act, 1870. The defendants refused to pay more than the £100 sterling in discharge of the bond, and 2½ per cent. thereon in sterling for interest —thus taking advantage of the fall in the value of sterling since Great Britain went off gold in 1931. Thereupon the plaintiffs launched the present action, the writ being served, by leave, out of the jurisdiction.

The action came to trial before HILBERY, J., in Jan., 1936, on the pleadings so framed, and on Jan. 16 he gave judgment in favour of the defendants, deciding (i) that the clause was not a gold value clause, and that the measure of the defendant company's obligation as to both principal and interest according to the number of pounds on demand was British sterling ; and (ii) that the defendants were not estopped by the judgment in the previous action from disputing the interpretation embodied in the declaratory judgment then obtained.

The plaintiffs thereupon gave notice of appeal, but before the appeal could be reached the legislatures of New Brunswick and of Canada, respectively, both passed legislation, the former on Apr. 2, and the latter on Apr. 10, 1937, affecting gold clause obligations, having a similar object to the legislation of the United States of America, which had to be considered by our courts, including the House of Lords, in the case of *R.* v. *International Trustee for the Protection of Bondholders Akt.* (2). On the issue of interpretation it is to be observed that the language of the bond is not the same for both principal and interest. It was argued for the railway company that the absence of any reference to gold in the interest provision had a direct bearing upon the construction of the covenant to pay the principal. I do not think that this argument carries much weight in the present case, and, therefore, I postpone consideration of the interest provision until after I have dealt with the principal debt.

The promise is to pay "one hundred pounds sterling gold coin of Great Britain of the present standard of weight and fineness," and the place of payment is " the railway company's agency in the city of London, England." The date of the bond was Aug. 1, 1884. On that date the gold content of the British pound was precisely known, being fixed by the schedule to the Coinage Act, 1870. In Aug., 1934, when the 50-year bonds matured, Great Britain having in 1931 gone off the gold standard, the value of the pound sterling was greatly depreciated as compared with its value in 1884. No contention was put forward at the trial that the proper law of the contract was Canadian law, and no evidence as to Canadian law was given. The bond, therefore, fell to be interpreted by the judge in all its aspects according to English law.

The gold clause in the bond is, in my opinion, substantially, although not completely, identical with the gold clause which was the subject of decision in *Feist* v. *Société Intercommunale Belge d'Électricité* (1), where the House of Lords held that it should be construed, not literally as a promise to pay the described coins, but as a measure of the borrower's money obligation of repayment.

Hilbery, J., discussed that case with care, and he arrived at the conclusion that the language of the bond in the present case differed so much from that of the bond in *Feist's* case (1) that that decision did not govern the present case. He pointed out that in that case Lord Russell of Killowen had conceded that his construction of the words was one " which strained the words " ; and he added that every one of the considerations which had led Lord Russell of Killowen to that strained construction was absent from the case before him, and accordingly he construed the bonds as sterling bonds pure and simple, entitling the railway company to discharge each bond by paying £100 in current sterling, without any regard to the words " gold coin of the present standard of weight and fineness." Thus, he not only held that *Feist's* case (1) was distinguishable, but actually thought that the reasoning of Lord Russell of Killowen supported him in that conclusion. In the result, he held that the whole bond was impressed with the character of a bond for repayment of £100 sterling, and that the words about gold coin affected the modality only and not the measure of the payment. I feel bound to hold that he was wrong. In my opinion, he misunderstood, or misapplied, the reasoning of Lord Russell of Killowen in the *Feist* case (1). In particular, he failed to realise how great was the importance attached by Lord Russell of Killowen to the presence of the gold clause itself, the language of which was so nearly identical with that of the gold clause in the present case.

The risk of currency depreciation was just as much in the minds of all concerned in the business of finance in 1884 as it was in 1928. American greenbacks had suffered from depreciation from 1862 down to only a short time before 1884, and gold clauses were common in long-term contracts, for the purpose of protecting the lender from the risk of depreciation : see the observations of Lord Maugham in *R.* v. *International Trustee for the Protection of Bondholders Akt.* (2), at p. 562.

Gold value was in practice the simplest known device for the purpose, and I wholly fail to see in the present case what object there could have been for introducing the reference to gold unless it was to ensure that the measure of the payment at maturity should be equal to the measure of obligation which the parties to the original bargain had in mind when they made it. A

Had the case of *R.* v. *International Trustee for the Protection of Bondholders Akt.* (2) reached the House of Lords, or even the Court of Appeal, before the present case came for trial, I conceive that Hilbery, J., would very possibly have decided differently ; but he did not have the advantage, open to us, of considering the opinion of this court delivered by B Lord Wright in that case at pp. 505-523, in which he dealt at length with the interpretation of a gold clause similar in essence to the clauses in the *Feist* case (1) and in this case, nor the expressions of agreement with the principles and conclusion of the interpretation of Lord Wright which fell from their Lordships in the House of Lords in the *International* C case (2). That being so, I think it superfluous to criticise his judgment in detail. It is enough to say that, having regard to what I have said about the *Feist* case (1) and the *International* case (2), I regard the present case as concluded by authority so far as concerns the interpretation of the gold clause in the provision for repayment of principal ; and D I think that, even if we thought otherwise (which I for one do not), we should be compelled to hold that the clause is a gold value clause—a clause prescribing the measure, and not merely the modality, of the obligor's obligation. In *Feist's* case (1), the bonds were issued in 1928 by a Belgian company. They were for £100, for 35 years, payable to E bearer at the offices of the company's bankers in London in sterling " in gold coin of the United Kingdom of or equal to the standard of weight and fineness " existing in Sept., 1928. The interest clause was similar. In addition there was there a further relevant clause, cl. 4, which was as follows : F

> This bond is one of an authorised issue of bonds of the company of an aggregate principal amount not exceeding £500,000 in sterling in gold coin of the United Kingdom at any one time outstanding.

English law was made applicable by an express clause. Lord Russell of Killowen pointed out, at pp. 171, 172, that complete performance G of the gold clause in a literal sense could never have been a practical possibility, and that, therefore, the parties could not have intended its literal meaning. He therefore sought a clue to their real intention in framing the gold clause, and found it in cl. 4, which I have just quoted. With its assistance, he arrived at his conclusion, as stated at p. 172 : H

> I think that in cls. 1 and 2 of the bond the parties are referring to gold coin of the United Kingdom of a specific standard of weight and fineness, not as being the mode in which the company's indebtedness is to be discharged, but as being the means by which the amount of that indebtedness is to be measured and ascertained. I would construe cl. 1 not as meaning that £100 is to be paid in a certain way, but as meaning that the obligation is to pay a sum which would represent the equivalent of £100 if paid in a particular way ; in other words, I would construe the clause

as though it ran thus (omitting immaterial words) " pay . . . in sterling a sum equal to the value of £100 if paid in gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on Sept. 1, 1928."

In my view, it would be a mistake to suppose that it was cl. 4 rather than the gold clause itself which really determined his conclusion, for at the very end of his opinion he disclosed (as it appears to me) the broader A view quite clearly in the quotation from a judgment of the Hague Court in the *Serbian Loans Case* (21), which he gave, not as a binding authority, but as an expression of principle which commended itself to his mind. I quote the passage at p. 173, because it is very apt in the present case :

> As it is fundamental that the terms of a contract qualifying the promise are not B to be rejected as superfluous, and as the definitive use of the word " gold " cannot be ignored, the question is : What must be deemed to be the significance of that expression ? It is conceded that it was the intention of the parties to guard against the fluctuations of the Serbian dinar, and that, in order to procure the loans, it was necessary to contract for repayment in foreign money. But, in so contracting, the parties were not content to use simply the word " franc," or to contract for payment in French francs, but stipulated for " gold francs." It is quite unreasonable C to suppose that they were intent on providing for the giving in payment of mere gold specie, or gold coins, without reference to a standard of value. The treatment of the gold clause as indicating a mere modality of payment, without reference to a gold standard of value, would be, not to construe, but to destroy it.

In *Feist's* case (1), LORD WRIGHT said that he fully agreed with the reasoning and conclusions of LORD RUSSELL OF KILLOWEN.

D In the case of *R.* v. *International Trustee for the Protection of Bondholders Akt.* (2), the bonds which were the subject of the litigation had been issued in exchange for convertible gold notes in accordance with a provision in the notes. The occasion of the note issue was the raising of a very large war loan by the British Government in the United States E of America in 1917, just before that country came into the War. It must have been obvious to all, at the time of issue, that stability in the measure of the ultimate obligation of repayment was essential to the success of the loan. The main question in that litigation was whether the proper law of the contract was English or American, and on this F issue LORD ATKIN, in his opinion, cited *in extenso* the whole of the relevant documents, but, for the more limited purpose of throwing light upon the interpretation of the gold clause here, it is enough to quote the title of the bonds and the words of the gold clause itself, at p. 551 :

> Twenty-year 5½ per cent. coupon gold bond. Payable Feb. 1, 1937. Such G principal sum and the interest thereon will be paid at the option of the holder, either in the city of New York, state of New York, United States of America, at the office or agency which will be maintained in the said city by the obligor for the service of the bonds of this issue in gold coin of the United States of America of the standard weight and fineness existing Feb., 1917, or in the city of London, England, in sterling money at the fixed rate of 4.86½ dollars to the pound.

H The reason why the question of the proper law of the contract was a vital issue was that the United States had just passed a law authorising, if not compelling, discharge of gold value obligations in current legal tender, although depreciated.

BRANSON, J., decided that the proper law of the contract was English, following certain previous expressions of judicial opinion that, when the sovereign of a state contracts a loan in another country, the contract is governed by the law of the state contracting the loan ; but, although he decided that the proper law of the contract was English, he held that the recent American legislation made it illegal to pay in gold coin, and that therefore the clause was void so far as the holder exercised the option for requiring payment in the United States of America. With regard to payment when made in London, he held that it should be of such sum in sterling calculated at the rate of 4.86½ dollars to the pound sterling as was equivalent to the nominal amount of the bond or interest coupon. He accordingly entered judgment for the Crown.

The Court of Appeal agreed with the judge in following the previous *dicta*, and held that, because the loan was raised by the British Government, the proper law of the contract was British ; but they disagreed with the interpretation of Branson, J., of the gold clause, and adopted the *Feist* construction (1), that is to say, that it was a device for fixing the amount of ordinary currency which had to be paid. They accordingly held that no question of illegality arose under the new gold legislation, and gave judgment for the holders for the larger amount.

The House of Lords refused to follow the old *dicta*, and held that this contract was American in its main characteristics, and was therefore governed by American law. The result of this decision was to make automatically applicable to the performance of the contract the special law passed by Congress about gold clauses. It was to the effect that every provision contained in any obligation which purported to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount of money of the United States measured thereby, was against public policy, and that any such obligation should be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment was legal tender for public or private debts. The House accordingly held that by reason of that law the obligor's obligation was to be measured in current dollars without reference to the gold clause, that is to say, that the payment due was 1,000 dollars, and not 1,670 dollars, as it would have been on the plaintiffs' basis. Lord Atkin added, at p. 554 :

> I come to this conclusion without attempting to answer the question put in argument, What would have been the result of the issue in America in 1917 if there had been expressed in the pledge agreement or in the notes the term that the contract was to be governed by English law ?

On the next page, however, he did express a provisional agreement with the construction put on the bond by the Court of Appeal, applying English law ; and Lord Russell of Killowen said, at p. 556 :

> I agree with the Court of Appeal that the clause should be construed as a contract to pay in the city of New York the value in currency of gold coin of the weight and fineness specified. The features which point to that construction are no doubt less numerous and less strong in the present case than in the *Feist* case (1). These gold clauses have, however, come under the review of judicial tribunals in many countries and the "*Feist* construction" (1) has prevailed, in that they are generally regarded merely as clauses to protect one of the contracting parties against a

> depreciation of the currency. It would, I think, be regrettable if uniformity in this respect did not prevail and a different construction should be applied, except in cases where the "*Feist* construction" (1) is expressly excluded.

This was doubtless an *obiter dictum*, but it is very valuable as a rider to his opinion in *Feist's* case (1), after hearing the argument in the *International* case (2), and is, of course, of itself entitled to the greatest weight in this court, as is also the language of this court as expressed by Lord Wright, M.R., at p. 515, where he refers to the citation by Lord Russell of Killowen of the *Serbian Loans Case* (21), which I have already quoted. Lord Wright, M.R., there said:

> We particularly refer to this part of his Lordship's judgment because it illustrates a matter of very considerable importance. The gold clauses in bonds and obligations are very common in international contracts and in every part of the world. It would be a very serious matter if contracts of that character were treated by particular courts as having a different meaning, in the absence of language and surrounding circumstances of a decisive character compelling that conclusion. The construction of such commercial clauses ought to be as far as possible uniform unless there are the strongest considerations involving a different construction.

For the above reasons, I have no doubt that, on the issue of the construction of the gold clause in the present case as to the principal payment, our decision should be in favour of the plaintiff company. This interpretation must be read into the bond, and the bond must be treated for all purposes in this action and appeal as if it had always contained in print an express term that, in the event of depreciation of sterling in comparison with sterling of the 1870 gold basis, a proportionately larger number of sterling pounds would be payable by the railway upon the maturity of the bonds.

The interest provision can be dealt with shortly. It refers to sterling, and contains no reference to the gold standard. The defendant company accordingly argued that it meant what it said, and that it was unambiguous. On the whole, I think that it is impossible to suppose an intention of the parties to have one measure for interest and another for principal, and I therefore construe the word "sterling" as meaning "sterling as aforesaid." The ambiguity in the less important clause must yield to the unambiguous provision of the dominant clause. We were told that interest had always in fact been paid in sterling, since 1931 as well as before, but this fact does not affect the issue of interpretation.

The second main issue is that of estoppel. If I am right in the view that I have taken upon the question of interpretation, the plea of estoppel set up in the reply is irrelevant to that question in the case. The replication is wanted by the plaintiffs only if, in law, they are wrong on the first issue. In my view, the plaintiffs are right on the question of estoppel as well as on the question of interpretation. A detailed discussion of the cases bearing on the principle of *res judicata* is, I think, unnecessary. They were fully considered by the Privy Council in the case of *Hoystead* v. *Taxation Comr.* (14), and, although the judgment of the Privy Council is not binding upon this court, it is right, as has been frequently said, that we should treat it with the greatest respect. I humbly express my complete concurrence with the principles laid down in *Hoystead's* case (14), and think that the rule stated by the late Lord Craigmyle (then Lord Shaw), in delivering the judgment of their Lordships, is conclusive in the present case. Lord Shaw said, at p. 170:

> A It is seen from this citation of authority that if in any court of competent jurisdiction a decision is reached, a party is estopped from questioning it in a new legal proceeding. But the principle also extends to any point, whether of assumption or admission, which was in substance the ratio of and fundamental to the decision. The rule on this subject was set forth in the leading case of *Henderson* v. *Henderson* (20), by Wigram, V.-C., as follows: "I believe I state the rule of the court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties B to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, C but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." This authority has been frequently referred to and followed, and is settled law.

There is a further question of estoppel, but that arose out of the Canadian legislation of 1937, and I postpone it until I have dealt with D that legislation.

The third main issue is raised by the plea, in para. 5a of the amended defence, that, even if, on the true interpretation of the bonds, the gold clause entitled the plaintiffs to an increase in the number of sterling pounds payable so as to countervail the depreciation of sterling, the E Canadian legislation of 1937 deprived them of this vested right. If this plea is good, then the success of the plaintiffs on either or both of the issues of interpretation and estoppel will not prevent their losing their appeal, for it is obvious that the estoppel cannot apply to this defence. There are two statutes which are relevant, the Canadian Statutes, 1937 F (c. 37), passed on Apr. 10, 1937, and the New Brunswick Act, 1937 (c. 45), passed on Apr. 2, 1937. At first sight the language of both the statutes seems wide enough to cover the payment clauses of bonds like those in question here, but I have come to the conclusion, not without certain doubts raised by a recent judgment of the Privy Council, to which I will G refer presently, that neither Act, when interpreted in accordance with the principles of private international law as applied in English courts, touches the gold clause of these bonds.

Before, however, I deal with this question which depends on English law, there is a preliminary point to be decided which was raised before H us as to the Federal Act. It was suggested that it was *ultra vires* the Federal legislature, on the ground that the whole undertaking of the New Brunswick railway was a "provincial matter" excluded from the legislative jurisdiction of the Federal Parliament by our own Imperial statute, the British North America Act, 1867. The defendant railway company's undertaking was, so far as the part within Canada was concerned, situate wholly in the province of New Brunswick, one of the four original provinces into which the new Dominion of Canada was divided by the British North America Act, 1867, s. 5. By sect. 92, the provincial legislatures were given exclusive power to legislate upon provincial A subjects, of which a list is given in that section. No. 10 of that list is :

> Local works and undertakings, other than such as are of the following classes [*inter alia*], (*a*) . . . railways . . . connecting the province with any . . . other provinces, or extending beyond the limits of the province : (*c*) such works [including railways] as, although wholly situate within the province, are . . . declared by the Parliament of Canada to be for the general advantage of Canada.

B This provision constituted a railway undertaking situate wholly within one province a provincial subject, and, therefore, *prima facie* made the New Brunswick railway a subject reserved exclusively to the New Brunswick legislature. On the other hand, by sect. 91, the Parliament of Canada was given power to legislate in relation to all matters not C coming within the classes of subjects assigned exclusively to the provincial legislatures. Three such subjects were currency, legal tender, and, in particular :

> such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces D [for example, item (*c*) in No. 10 of the provincial list].

In 1881, the Parliament of Canada at a date prior to the construction of the New Brunswick railway passed an Act (44 Vict., c. 42) of which sect. 1 says :

> E The work of the New Brunswick Railway Company is hereby declared to be a work for the general advantage of Canada.

There seems to me no doubt that after the above declaration the Parliament of Canada became entitled to legislate in respect of the New Brunswick Railway Company on any matters affecting its property or obligations. F I therefore hold that the Federal Gold Clauses Obligations Act, 1937, was *intra vires* the Canadian Parliament, and accordingly operated in New Brunswick as soon as it was passed.

Both Acts raise the same fundamental question of law, but, owing to the difference of language between them, it is convenient to deal with G the Federal statute first. As a pure question of construction of its language, what is the meaning of the words in sect. 4, " a gold clause obligation governed by the law of Canada " ? Does the gold clause of these bonds fall within them ? If not, it is excluded by these words from the operation of the Act. The word " govern " in the phrase H " governed by the law of Canada " is a word of art borrowed from leading English authorities on private international law. It is sufficient to quote two instances of its judicial use in our courts. In *Jacobs* v. *Crédit Lyonnais* (22), Bowen, L.J., said, at p. 600 :

> The broad rule is that the law of a country where a contract is made presumably governs the nature, the obligation and the interpretation of it, unless the contrary appears to be the express intention of the parties.

Again, in *Gibbs & Sons* v. *Société Industrielle et Commerciale des Métaux* (23), Lord Esher, M.R., said, at p. 513 of The Law Journal Report :

> Now the contract here is an English contract, for, first, it was made in England ; and, secondly, it is to be performed in England. In either case, the law which governs the contract is the law of the country where the contract is made, or where it is to be so performed that it is to be considered to be of that country. The law of that country in every respect in which it governs the contract as a contract is A to be applied to it. I state the proposition thus, in order to put aside any laws of procedure preliminary to the bringing of the action, or affecting the course of procedure after the action has been brought ; for the laws of procedure which govern are the laws of the country in which the action is brought.

In short, the phrase in question is merely another way of expressing Professor Dicey's proposition that "the proper law of the contract" is B English or French or whatever it may be : see Dicey's Conflict of Laws, 5th Edn., rr. 155, 161, 162, pp. 628, 665, 678. Rule 161 is as follows :

> The interpretation of a contract and the effect, that is, the rights and obligations under it of the parties thereto, are to be determined in accordance with the proper C law of the contract. (2) When the intention of the parties to a contract with regard to the law governing the contract is not expressed in words, their intention is to be inferred from the terms and nature of the contract and from the general circumstances of the case, and such inferred intention determines the proper law of the contract.

His use of the words "law governing the contract" as the equivalent D of "the proper law of the contract" may be noted. Sub-rule (3) is as follows :

> In the absence of countervailing considerations the following presumptions as to the proper law of the contract have effect First presumption : *Prima facie* the proper law of the contract is presumed to be the law of the country where the contract is made (*lex loci contractus*) ; this presumption applies with special force E when the contract is to be performed wholly in the country where it is made, or may be performed anywhere, but it may apply to a contract partly or even wholly to be performed in another country. Second presumption : When the contract is made in one country and it is to be performed either wholly or partly in another, then the proper law of the contract, especially as to the mode of performance, may be presumed to be the law of the country where the performance is to take place (*lex loci solutionis*).

F

In my view, these presumptions are established by the judicial statements in the cases cited by Dicey, particularly the judgments of Bowen, L.J., in *Jacobs* v. *Crédit Lyonnais* (22), at p. 600, and of Lord Esher in *Chatenay* v. *Brazilian Submarine Telegraph Co.* (24), at pp. 82, 83, and by the Privy Council in *Benaim & Co.* v. *Debono* (25), at p. 520. G

Although Dicey's second presumption is supported by the authorities I have cited, it is only a presumption, and the decision as to whether, in any particular contract, the law of the place of performance governs the contractual obligations which define the duty of performance depends on the language and circumstances of that contract. In the present case, H I do not doubt that, leaving on one side that part of the contract which relates to performance, the proper law of the contract generally is the law of Canada. The bond is given by a Canadian corporation, executed in Canada, concerning a Canadian railway and secured by a trust deed upon Canadian land. In such circumstances, no conclusion is possible but that it was the intention of the parties that the contract should be generally regulated by Canadian law. Although, for these reasons, we are bound to conclude that the *lex loci contractus* is the proper law of the contract for the general purpose of interpreting its obligations, I do not think that this conclusion affects the interpretation of the payment clause, and still less does it affect its judicial enforcement in London. A To that part of the contract the *lex loci solutionis* is, in my opinion, applicable.

That this was the conscious intention of the parties is, I think, shown by the terms of the deed itself, a consideration which helps to confirm B the general presumption which our law recognises as appropriate in regard to the obligation of performance in another country than that in which the contract is made. There are definite words which so point to English law. " The present standard of weight and fineness " of the gold sovereign which was stipulated by the parties was that laid down C by English statute, and indeed it may be said that the primary intention of the parties was that payment should be made in English gold sovereigns. That form of payment being at the date of maturity no longer possible, it became necessary for the court to decide how, in such circumstances, the contract should be read so as to give effect to the D dominant intention of the parties as disclosed in the above provision of the contract. My conclusion on that matter has already been stated by me in the first part of this judgment, where I dealt with the interpretation of the gold clause. The solution of that problem involved no issue of Canadian law nor of conflict of laws, for there was no evidence E before the court that on the issue of interpretation there is any difference between Canadian law and English law. If the words of my *Feist* (1) interpretation are read into the bond as representing what may be called the implied secondary intention of the parties in regard to the obligation of payment, namely, to pay 100 plus X sterling pounds, to F represent the depreciation, we arrive at a position in the event that happened of a Canadian contract to pay, say, £150 sterling in London. I cannot but regard English law as the proper law to apply to such an obligation of performance for the purpose of enforcing it. This conclusion rules out both the Canadian Acts, the Federal Act by reason of G the express limiting words in its sect. 4, which make the whole Act irrelevant, and the New Brunswick Act because the conclusion that English is the proper law of the contract *quoad* performance in England excludes that Act as effectually as if it had contained the express limiting words of sect. 4 of the Federal Act.

H I now, however, come to the doubt which I mentioned a little earlier, arising out of a recent decision of the Privy Council. The case is that referred to by GREER, L.J., *Mount Albert Borough Council* v. *Australasian Temperance & General Mutual Life Assurance Society, Ltd.* (17), decided on Oct. 18, 1937. The judgment was delivered by LORD WRIGHT. The appellants in that case were a New Zealand borough council. On Aug. 31, 1926, they issued in New Zealand, under the Local Bodies' Loans Act, 1913, of that country, debentures secured by the borough rates carrying interest at £5 13*s.* 9*d.* per cent. payable half-yearly on Mar. 1 and Sept. 1 in each year. Both capital and interest were payable at the Bank of New Zealand in Melbourne, Australia. The respondents were the original holders, having made the loan to secure which the debentures were issued. The Loans Act, 1926, which had superseded the Loans Act, 1913, contained provisions dealing with the case of default in paying the sum secured ; they enabled the Supreme Court of New Zealand, on petition, to appoint a receiver of such part of the local fund or other property of the local authority as was charged for payment of the debenture or coupon. The charge on the rates, as LORD WRIGHT pointed out, was a charge on land in New Zealand. In 1932, a Victorian statute known as the Financial Emergency Act, 1931 (amended in 1932), provided for a compulsory reduction of interest on, *inter alia*, mortgages to a rate less than the rate of interest stipulated in the debentures in question. The Privy Council held, affirming the New Zealand Court of Appeal, that the debentures were not mortgages within the meaning of the Victorian legislation, and that decision does not affect any question in the present appeal. However, there are certain important passages in the judgment in which *prima facie* a further ground for the decision was discussed having a close bearing upon the issue of conflict of laws raised in the present appeal. The first passage is at pp. 213, 214 :

> The debentures and the interest coupons, in so far as they give a security on real property—namely, a portion of the local rate in New Zealand—are beyond question governed by the New Zealand law. The security can be enforced only in the courts of New Zealand and in the manner provided by the Loans Act. It is not disputed that these rights are governed by New Zealand law. But, in their Lordships' judgment, it is equally true that the personal obligation to pay is a New Zealand contract, governed by New Zealand law. It seems impossible to sever this personal covenant from the mortgage provisions which secure it. Indeed, the whole tenor of the transaction is consistent only with its being governed by New Zealand law. The loan was agreed in New Zealand, the money under the loan was paid by the respondents to the appellants there. The appellants were a statutory body in New Zealand which, in borrowing, were acting under the statutory powers contained in the Loans Act as set out above. The respondents carried on business in New Zealand as well as in Australia. It is true that the place of repayment of the loan and of payment of interest from time to time was to be Melbourne, in Australia ; but even that was fixed in accordance with the Loans Act, 1913, s. 32 (sect. 37 of the Act of 1926), which required payment of the debt to be at the place within or out of New Zealand named in the debenture, so that the obligation to pay has statutory sanction.

The main argument of the appellants was that the *situs* of the debt was Melbourne, and that, for that reason, Victorian law was applicable to its discharge. This was rejected ; but LORD WRIGHT added, at p. 214 :

> Nor can they [their Lordships] accept the view that the obligation to pay is here governed by the place where it is stipulated that payment is to be made, in the sense that the amount of the debt as expressed in the instrument creating it can lawfully be varied by the Victorian Financial Emergency Act so as to bind a foreign jurisdiction or, indeed, at all. So to hold would be, in their Lordships' judgment, to confuse two distinct conceptions ; that is, to confuse the obligation with the performance of the obligation. It is well established in the law of England and

of New Zealand, which in this respect follows it, that the proper law of a contract has to be first ascertained where a question of conflict of laws arises.

He further pointed out that the House of Lords, in *Adelaide Electric Supply Co., Ltd.* v. *Prudential Assurance Co., Ltd.* (15), upon which counsel for the appellants was relying, was not concerned " with questions A of the substance of the obligation, which, in general, is fixed by the proper law of the contract," but (at p. 215):

> only with performance of that obligation with regard to the particular matter of the currency in which payment was to be made. There was no question such as a reduction in the amount of the debt or liability, or other change in the contractual obligation. The House of Lords had no intention of questioning the distinction emphasised in *Jacobs* v. *Crédit Lyonnais* (22) between obligation and performance. B Indeed, that line of authorities was not referred to either in argument or in the speeches. It may be that in some cases difficulties have arisen in distinguishing " obligation " from " performance," and that " manner and mode of performance " may affect the value of the obligation.

LORD WRIGHT further pointed out that the Victorian statute in that case was:

> C in express terms directed to " obligation "—that is, to the construction and effect of the mortgage and the reduction of the covenanted rate of interest.

He then added at p. 216 that to adopt the appellants' contention:

> would not be to apply the law of the place of performance to the performance of the contract, but to apply it so as to change the substance of the obligation, because, according to the appellants' contention, the Acts would be applied to change the D amount payable, which is a matter of obligation and is not a mode or manner of performance.

He also went on to say that their Lordships did not think it necessary to pursue that aspect of the case, or to give any final opinion on it, and decided the case on the point that the Victorian Act did not apply to E the debentures in question, because they were not mortgages within the meaning of the Victorian Acts.

There was, therefore, no decision by the Board directly on the points with which we have to deal, and there are certain definite distinctions between that case and this. There the law of the place of performance F was invoked in order to change the obligations of the contract as defined by the proper law of the contract as a whole. In the present case, the measure of the obligations to be enforced, so far as the contract is concerned, is supplied by the unaltered terms of the contract as correctly interpreted. English law would enforce those terms as so interpreted G without any alteration. The case is the precise converse of the *Mount Albert* case (17). There the local statute sought to alter the bargain the parties had made. Here the contention is that the English court should ignore the ordinary rule that the law of the place of performance governs the performance, and apply a Canadian statute to alter the contract H *ex post facto*. I cannot think that the phrase in the opinion of LORD WRIGHT, which I have quoted, " that the personal obligation to pay is a New Zealand contract, governed by New Zealand law," has any application to the facts of the present case. I do not understand the Board as intending to express their disagreement with DICEY's rules, or with the judicial passages in the Court of Appeal decisions which I have quoted in support of those rules. These considerations, I humbly conceive, dispose of the doubt which was raised in my mind by some of the observations in the opinion of Lord Wright.

There is one final consideration which, in my opinion, compels us to disregard the two Canadian statutes. They were passed long after the action had been brought in the King's Bench Division and judgment A had been given in the trial court. If we think that judgment ought there to have been entered for the appellants instead of for the railway company, in my opinion it follows that we ought to think of the judgment there as if Hilbery, J., had given judgment for them instead of for the defendants. In that case, the bondholders' right, instead of being B a mere contractual right, however well secured, would have passed into a judgment of an English court, creating what is in law a wholly new right, even although the security may be still available for the purposes of execution. To this right the two Canadian statutes have no application. The appeal should, in my opinion, be allowed. C

Greer, L.J.: Mr. Christie, it appeared yesterday that some difference of opinion had arisen between Scott, L.J., and myself as to the rate at which interest should be paid. At the hearing, we did not have any argument about interest. I have looked again at the declaration D in the first case, and it decides that interest is to be calculated at the same rate as the principal. Therefore, I think that the view of Scott, L.J., must be right, and that mine must be wrong. It is covered by the estoppel.

Slesser, L.J.: For myself, I should like to say that, though I did E not express an opinion on the point yesterday evening, I have thought the matter over. Had the matter been free, I think that I should have been inclined to come to the view that, so far as the interest is mentioned to be in sterling and the principal in terms of gold coinage, the interest should be paid in sterling; but I agree with Greer, L.J., that that F matter is now the subject of an estoppel under the earlier declaration from the court.

Greer, L.J.: The declaration in the former action, after dealing with principal, goes on to say:

> (b) by way of the half-yearly interest due thereunder on the said Aug. 1, 1934, G a sum equal to 2½ per cent. of the amount specified in (a) above [the amount arrived at by the gold clause].

I think it is quite clear that, if there is an estoppel, it applies to interest as well as to principal.

Christie: And, of course, it should be 2½ per cent., less income tax.

Appeal allowed. Interest to be paid at the rate of 5 *per cent. up to Aug.* 1, H 1934, *and thereafter at* 4 *per cent. until the bonds should be surrendered. Leave to appeal to the House of Lords.*

Solicitors: *Allen & Overy* (for the appellants); *Linklaters & Paines* (for the respondents).

[*Reported by* E. Fuller Briscoe, Esq., *Barrister-at-Law.*]

MURRAY v. THOMAS.

[CHANCERY DIVISION (Clauson, J.), **November 23, 1937.**]

Charities—Charitable purpose—War memorial—Memorial of use to the living—Memorial hall.

A Included in the objects of an association formed by adjacent villages in 1917 was one for the erection of a permanent memorial or memorials to perpetuate the memory of those from the district who served in the Great War. A circular distributed by the association in the latter part of 1917 stated the aims of the committee and said that the committee were of opinion that this memorial "should be of a useful character, possibly in the nature of a memorial hall." In response to this circular B a sum exceeding £1,000 was collected, but later the two villages became divided in their views, and an arrangement was made for the funds to be divided between them in unequal shares. Each village put up some small memorial, but the balance of the money was not enough to build the memorial hall. A number of people withdrew from the scheme, and their subscriptions were returned to them. A balance of about £1,000 remained in the hands of the plaintiff, who asked for C directions as to its application :—

HELD : the object of the association was to promote for the benefit of the two villages some useful memorial, preferably of the type of a village hall. That was in law a charitable purpose, and the preparation of a scheme should be directed.

D **[EDITORIAL NOTE.** A war memorial of a substantial kind, intended not only to commemorate the dead, but also to serve some purpose for the betterment of the living, is here held to be a charitable purpose ; but the point is left open whether a fund for the erection of a mere cross, or similar memorial, is in law one for a charitable purpose.

AS TO WAR CHARITIES, see HALSBURY, Hailsham Edn., Vol. 4, p. 217, para. E 312 ; and FOR CASES, see DIGEST, Vol. 8, pp. 260, 261, Nos. 218-239.]

Cases referred to :

(1) *Income Tax Special Purposes Comrs.* v. *Pemsel,* [1891] A.C. 531 ; 8 Digest 241, *1* ; 61 L.J.Q.B. 265 ; 65 L.T. 621.

F (2) *Verge* v. *Somerville,* [1924] A.C. 496 ; Digest Supp. ; 93 L.J.P.C. 173 ; 131 L.T. 107.

(3) *Goodman* v. *Saltash Corpn.* (1882), 7 App. Cas. 633 ; 8 Digest 327, *1099* ; 52 L.J.Q.B. 193 ; 48 L.T. 239.

(4) *Re King, Kerr* v. *Bradley,* [1923] 1 Ch. 243 ; Digest Supp. ; 92 L.J. Ch. 292 ; 128 L.T. 790.

G (5) *Stephens* v. *Mysore Reefs (Kangundy) Mining Co., Ltd.,* [1902] 1 Ch. 745 ; 9 Digest 83, *325* ; 71 L.J. Ch. 295 ; 86 L.T. 221.

(6) *Spiller* v. *Maude* (1881), 32 Ch. D. 158, *n* ; 8 Digest 348, *1412.*

(7) *Re Stanford, Cambridge University* v. *A.-G.,* [1924] 1 Ch. 73 ; Digest Supp. ; 93 L.J. Ch. 109 ; 130 L.T. 309.

H

ACTION to have it determined and declared whether, in the events which have happened, the subscribers to a war memorial fund are entitled to be repaid the whole or any proportion of their subscriptions out of the unexpended balance of the fund still in the hands of the association, or whether such balance is devoted to charitable purposes and ought to be applied *cy-près*. The objects of the association are stated in the judgment.

R. H. Hodge for the plaintiff.

J. A. Reid for the first defendant.

J. W. Brunyate for the second defendant.

Hodge stated the facts relating to the inception and objects of the A
association and to the work done. As the plaintiff was a trustee, he desired to maintain a neutral attitude.

Brunyate: This is an association of which the objects are wholly charitable, and the gift of each person was a gift to the association for its general objects, with no specific trusts. That being so, there can be no B
question of a resulting trust, as where there is a gift for charitable purposes which fail. In this case, there was a charitable association, which carried out some of its objects. The whole of the money was subscribed for charitable objects. The purposes of protecting soldiers in hard cases and protecting their dependents are quite clearly charitable purposes. C
Then, there is the question of perpetuating the memory of those men of the district who served in the War. The question as to whether a War memorial is a charity has never been decided, so far as I know. It was the intention to have a War memorial bearing the names of those who fought. It was necessary to get correct records, and this was ancillary D
to the erection of the memorial, as it was an important part of the commemoration. Object (*e*) is the one which appears the least charitable, but it is ancillary to the other objects. If the memorial was to be of a useful nature, it would come within the category of gifts for the benefit of a locality. It is an object beneficial to the community. If a memorial E
commemorates the inhabitants of a village who fought and died in the War, it is a charity, because it is for the benefit of the inhabitants of that particular locality, and is as much a charity as is any gift for the benefit of any town or village. The beautifying of a village is clearly charitable. Quite apart from that, a War memorial fulfils two main purposes. First, F
it tends to comfort those who have lost relatives in the War, because they know and feel that their relatives are kept in memory. To take such a practical step to comfort those who have been afflicted by war is clearly charitable. Secondly, it is charitable because it tends to the spiritual benefit of the community. It is difficult to analyse one's G
feelings about War memorials, but if one bears in mind that every November practically all the people of England stand in silence for two minutes in memory of those who died in the War, and that War memorials play an important part in that ceremony, it is very hard to say that this is not for the spiritual betterment of the people. History H
shows that it has always been regarded as such.

To say that this particular memorial was not charitable would be holding that the Cenotaph was not a charitable object. There can be no distinction drawn between the Cenotaph and the more humble memorial in this village. The people constituting the association have decided to go no further with the matter, and, for reasons of which we are not aware, they have let the matter slide. Therefore, the property of the association should be treated as charitable, and should be applied *cy-prés.* If there is an existing trust which the court can administer, the court has jurisdiction to direct a scheme. If there is no trust which the court can A administer, it is a sign manual case. But in the present case there would appear to be a trust. [Counsel referred to *Income Tax Special Purposes Comrs.* v. *Pemsel* (1), *Verge* v. *Somerville* (2), *Goodman* v. *Saltash Corporation* (3), *Re King, Kerr* v. *Bradley* (4), *Stephens* v. *Mysore Reefs (Kangundy) Mining Co., Ltd.* (5), and *Spiller* v. *Maude* (6).]

B *Reid :* The whole question arises on the first circular and the resolution passed at the meeting. There was a minute that the money should not be spent on any memorial other than a hall without the consent of the subscribers. For the association to establish its position as charitable, it must be wholly charitable, and not partly charitable and partly C benevolent. There was a difference of opinion in these two villages as to what was a proper object. The court has also to consider the clause "any other purpose which the association might deem desirable." A memorial is not necessarily charitable. It may be or it may not. The court will consider the other purposes, but it is not in itself a charitable D object. That being so, the objects are partly charitable and partly not charitable, and the association's funds are, therefore, not charitable. They are the property of the members, and there is a resulting trust. Supposing that there were a charitable purpose, that purpose has been fulfilled. Those who were interested in the matter came to think that E the hall might never be built, and so they decided that a cross should be erected, and that has been done. [Counsel referred to *Re Stanford, Cambridge University* v. *A.-G.* (7).]

CLAUSON, J. : This is an action which was commenced by writ, and F which I am now trying on affidavit evidence, and without pleadings, pursuant to an order made to that effect. The writ asks :

> (1) To have it determined and declared whether in the events which have happened the subscribers to the Elstree and Boreham Wood War Service Association are entitled to be repaid the whole or any and what proportion of their subscriptions out of the unexpended balance of the fund subscribed now in the hands of the G plaintiff as the treasurer of the said association or whether such balance is devoted to charitable purposes and ought to be applied *cy-prés.* 2) If the latter is the proper destination of the said balance that a scheme for its application may be settled. That the defendant Thomas may be appointed to represent subscribers who claim a return of the whole of their subscriptions and the plaintiff may be appointed to represent subscribers who claim a return only of a rateable proportion of their subscriptions. If and so far as necessary administration by the court of the trusts affecting the said fund.

H

Elstree and Boreham Wood appear to be two adjacent villages, and, as a result of various meetings held in the course of 1917 and afterwards, an informal association was formed. When I say "informal," it consisted of an executive committee, and, I suppose I may say, it consisted of those persons who were prepared, in response to the application of the executive committee and its members, to subscribe funds. The real substantial information one has about the purposes of the association comes from a circular which seems to have been extensively distributed in the neighbourhood in the latter part, I think I am right in saying, of 1917. That circular is headed : " Elstree and Boreham Wood War Service Association." Then there is a list of the officers forming the executive committee. It then proceeds as follows : A

> The association has been formed with the following objects : (*a*) To preserve a complete record of all service, naval, military and air, rendered by men in the district. (*b*) To obtain records of all casualties and honours to men in the district. (*c*) To organise expressions of sympathy or congratulation to men and dependants, and to secure their protection in hard cases. (*d*) To perpetuate the memory of those who serve in the district by erecting a permanent memorial or memorials. (*e*) Any other purpose which the association deems advisable. B

I have for convenience read out the objects as contained in this circular, but the objects are stated in practically similar terms in a minute book which was kept. The circular continues : C

> The nature of the memorial to be erected obviously depends on the financial support that the association receives. The committee hope that sufficient funds may be obtained for the erection of a permanent memorial, and they are of opinion that this should be of a useful character, possibly in the nature of a memorial hall, in which the records of the services rendered may be preserved, for use as a village club, and for the holding of such meetings as may be approved for social and instructive purposes. D The list overleaf gives the names of those who have already promised their support, and the hon. treasurer, Mr. R. Janvrin Dickson, of " Underfield," Elstree, will be very glad to know if you will allow him to add your name to it. If so, kindly fill up and return the attached slip to him. It may interest you to know that from returns already received, it has been ascertained that 341 men in the district have joined the Forces to date, of whom 26 have been killed, 40 wounded, 13 invalided out, and 4 taken prisoners of war. It is earnestly hoped E that this may be made a truly representative memorial, so all are asked to subscribe to it, however small the amount.

That is signed by the gentleman who was acting as chairman of the executive committee. Then follows a list of donations promised, many of them very substantial. Then there is a form for people to fill up. F What seems to have happened is this. In response to that circular, subscriptions were received, with the result that a very substantial sum exceeding £1,000 was collected. I do not think I need go into the subsequent history at very great length. I mentioned that there were two adjacent villages. A time seems to have come when there was a G split of interest between the two villages, and an arrangement was made whereby Elstree retained the major portion of the funds, and handed over the rest to a committee for Boreham Wood. What actually happened, as far as Boreham Wood is concerned, I am not clearly told, but I understand that a War memorial was erected. Elstree used part H of their funds towards the erection of a cross, the balance of the fund for that purpose being obtained from outside sources. That does not seem to have come into the hands of the association. It was found that the funds provided were not sufficient for doing what many of the subscribers thought would be a desirable thing, and that was to build a memorial hall. It was at a time when building-costs were very high. The net result was that the amount in hand would not run to that type of memorial. Consequently, there was a kind of secession, inasmuch as a number of ladies and gentlemen wanted their money back. Some of them got their money back, amongst whom was the first defendant in these particular proceedings. This part of the matter is all very obscure. For some unexplained reason, some people who asked for their money back got their money back in full, while some got back only a portion of their money, and some did not ask at all. The balance has remained, and has accumulated to some extent, so that the treasurer, the plaintiff in this action, has a sum of about £1,000 on his hands, and wants to know what to do with it.

As may be gathered from the second paragraph in the writ, the suggestion was made that these subscriptions should be returned in some shape or form to the subscribers, either that they should have their subscriptions returned in full or that there should be returned to them only a rateable proportion of their subscriptions. When the matter was discussed before me, that did not appear to be of very great importance. The real point was this. The Attorney-General has been made a defendant, and Mr. Brunyate, appearing for him, put forward in a very interesting argument the submission that these funds are charitable funds and that this association is a charitable association. For the purpose of considering whether that contention is sound, I must refer back to the circular I have already read, and particularly to the objects stated in the circular. It must be borne in mind that object (*e*) was in this form: "Any other purpose which the association deems advisable." It has been suggested that those words make the whole matter so vague, and put the matter so much at large, that it is difficult for me to say that the funds should be dedicated to charity. I do not take that view. I think the circular is to be read as a whole, and I think that those words "Any other purpose which the association deems advisable" are to be read in a narrow sense, and that they are meant to give a certain amount of play to the objects which are specified in (*a*), (*b*), (*c*) and (*d*). On reading (*a*), (*b*), (*c*) and (*d*) again, it is apparent that the main object is an object of commemoration by some outward and visible memorial, and not only commemoration by some outward and visible memorial, but also commemoration by doing something for the benefit of the men who served and who have served, so as to secure what is spoken of as "their protection in hard cases." I have no doubt whatever that a fund which was collected for that last purpose, for the protection in hard cases of men who served or have served, is charitable. I need not trouble with that further.

Then the question is whether the commemorative part of the objects indicated is charitable. For that purpose, it is necessary to read the following paragraph of the circular:

> The committee hope that sufficient funds may be obtained for the erection of

> a permanent memorial, and they are of opinion that this should be of a useful character, possibly in the nature of a memorial hall, in which the records of the services rendered may be preserved, for use as a village club, and for the holding of such meetings as may be approved for social and instructive purposes.

Reading the circular as a whole, I can feel no doubt that the object for which these funds were collected and the object of the association was to benefit the people of these two areas by having some commemorative institution which would be of public service to those two areas. What was contemplated was a memorial hall, a hall to be used as a village club and for general public purposes.

It is not necessary for me to express any final view on the argument that Mr. Brunyate put forward, that a fund collected purely to erect some memorial, not of a more useful character, but merely something in the nature of a cross, would of itself be for a charitable purpose. I am tempted to think that his argument is correct, but, having regard to the cases he has cited, although the point has not been expressly covered by authority, it would be in line with the cases already decided to say that to collect funds for a memorial of that character is to collect money for a charitable purpose, particularly when those to be commemorated are particularly connected with and concerned with a certain limited area. However, I do not think it is necessary, for the purposes of this case, that I should definitely decide that. It appears to be clear in this particular case that what was being aimed at was to promote, for the benefit of these two villages, some useful memorial, preferably of the type of a village hall. What has happened, I suppose, is that local interest has flagged. It was not possible to get a sufficient sum to build a satisfactory hall, and now the object cannot be carried out in the way marked out by the circular, because the way marked out by the circular was that the object should be carried out under the guidance of this committee. That, of course, is now impossible; the whole thing has come to an end. Many of those who were on the committee have died, and it is impossible to reconstitute the committee. It seems to be quite clear that the point of charitable intention covered the whole of this. I use the word "charitable," of course, in the legal sense, and not in the technical sense of relieving poverty. The machinery for that charitable purpose has now failed. What has to be done by the law of the country is that this court should put in train the preparation of, and the ultimate approval of, a scheme for doing, under the directions of the court, that which cannot be done *modo et forma* in the way in which the contributors intended it to be done.

Therefore, it is my duty now to carry out the intentions of those who made what I hold to be a charitable trust, to direct a reference to chambers and the preparation of a scheme carrying out those objects. Therefore, I propose to make an order on those lines. The costs of all parties up to and including this hearing should be taxed between solicitor and client, and should be paid and obtained by the plaintiff out of the funds which he has in hand. There will be a reference to chambers to settle the scheme.

Declaration that the balance in the hands of the plaintiff as treasurer of the association is devoted to charitable purposes. Costs of all parties, A *including cost of transcript of the judgment, to be taxed between solicitor and client and to be paid out of the funds the plaintiff has in hand.*

Solicitors: *Sole, Sawbridge & Co.* (for the plaintiff); *E. F. Turner & Sons* (for the first defendant); *Treasury Solicitor* (for the second B defendant).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

BESSLER, WAECHTER, GLOVER & CO. *v.* SOUTH DERWENT COAL CO., LTD.

[King's Bench Division (Goddard, J.), **November 18, 1937.]**

Contract—Contract required to be in writing—Variation—Whether variation required to be in writing—Mere forbearance to insist upon actual terms—Instalment deliveries under a contract for the sale of goods—Sale of Goods Act, 1893 (*c.* 71), *s.* 4.

The claimants made three separate contracts for the supply of coal by the respondents. Deliveries under the first contract were to be made from Apr. 1, 1935, to Dec. 31, 1935; under the second, from Jan. 1, 1936, to June 30, 1936; and under the third, from Apr. 1, 1936, to Dec. 31, 1936; that is, there would be double deliveries between Apr. 1, 1936, and June 30, 1936. Deliveries under the first two contracts being late, there was a prospect of an inconvenient quantity of coal being due for delivery from Apr., 1936, and in consequence in April of that year the parties verbally agreed that the deliveries under the third contract should not begin until those under the second contract had been completed, and that coal undelivered under the third contract on Dec. 31, 1936, should be delivered thereafter. During April, May and June, no deliveries were called for under the third contract. The final delivery under the second contract was made in July, and deliveries under the third contract then commenced. On Dec. 1, 1936, the respondents stated that they were compelled to cancel the arrears under the third contract, by reason of the failure of the claimants to take deliveries during April, May or June. The claimants claimed the delivery of the balance of coal outstanding, or damages for the non-delivery thereof. The dispute being referred to arbitration, the arbitrator found that the above verbal agreement was in fact made, and that it was in pursuance thereof that the claimants did not ask for deliveries in April, May or June. Against the contention that a verbal agreement could not operate to vary a contract required to be in writing, the claimants contended that (*a*) there was no new contract, but only a postponement of delivery; (*b*) if there were a new contract, it was not one for the sale of goods, but for the delivery of goods already sold; (*c*) if there were a new contract, it had been partly performed by deliveries:—

Held: (i) if the parties agree to rescind their original contract, and to substitute for it a new one, the latter must be evidenced by writing. A variation of the term of the original contract must also be in writing; but a mere voluntary forbearance to insist on delivery or acceptance according to the strict terms of the contract is not required to be in writing.

(ii) the facts in this case amounted to a mere forbearance to insist upon the precise terms of the contracts, and the Sale of Goods Act, 1893, s.4, was not an answer to the claim.

(iii) part performance by deliveries cannot be relied upon to render enforceable a variation of an existing contract, though it might, however, render enforceable a new contract substituted for one which has been rescinded.

[EDITORIAL NOTE. The authorities requiring the rescission or partial rescission of a contract, which is itself required to be in writing under the Statute of Frauds, or the various statutes which have replaced sects. 4 or 17 (6) thereof, are conflicting, and the judgment herein reconciles some of those which at first sight seem contradictory. His Lordship found the solution of the conflict in the opinion of Lord Atkinson given in *Morris* v. *Baron & Co.* (6), and proceeded upon the distinction between a mere forbearance to insist upon the terms of the contract and an actual variation of the terms. A mere forbearance is not required to be in writing but it is otherwise with an actual variation.

As to Variation of Contracts Required to be in Writing, see HALSBURY, Hailsham Edn., Vol. 7, pp. 202-205, paras. 281-285 ; and for Cases, see DIGEST, Vol. 12, pp. 353-359, Nos. 2938-2989.]

Cases referred to :

(1) *Stead* v. *Dawber* (1839), 10 Ad. & El. 57 ; 39 Digest 665, *2545* ; 9 L.J.Q.B. 101.

(2) *Tyers* v. *Rosedale & Ferryhill Iron Co.* (1875), L.R. 10 Exch. 195 ; 39 Digest 571, *1762* ; 44 L.J. Ex. 130 ; 33 L.T. 56.

(3) *Leather Cloth Co.* v. *Hieronimus* (1875), L.R. 10 Q.B. 140 ; 39 Digest 386, *231* ; 44 L.J.Q.B. 54 ; 32 L.T. 307.

(4) *Hickman* v. *Haynes* (1875), L.R. 10 C.P. 598 ; 39 Digest 659, *2512* ; 44 L.J.C.P. 358 ; 32 L.T. 873.

(5) *Plevins* v. *Downing* (1876), 1 C.P.D. 220 ; 39 Digest 549, *1581* ; 45 L.J.Q.B. 695 ; 35 L.T. 263.

(6) *Morris* v. *Baron & Co.*, [1918] A.C. 1 ; 39 Digest 398, *341* ; 87 L.J.K.B. 145 ; 118 L.T. 34.

(7) *Goss* v. *Nugent* (*Lord*) (1833), 5 B. & Ad. 58 ; 12 Digest 354, *2941* ; 2 L.J.K.B. 127.

(8) *Cuff* v. *Penn* (1813), 1 M. & S. 21 ; 39 Digest 653, *2466*.

(9) *Maddison* v. *Alderson* (1883), 8 App. Cas. 467 ; 12 Digest 161, *1176* ; 52 L.J.Q.B. 737 ; 49 L.T. 303 ; *affg.* (1881), 7 Q.B.D. 174.

(10) *Ogle* v. *Vane* (*Earl*) (1868), L.R. 3 Q.B. 272 ; 39 Digest 676, *2624* ; 37 L.J.Q.B. 77.

Special Case stated by an umpire. The dispute, which had been referred to arbitration, arose under a contract for the supply of coal by instalments by a colliery company. The time of delivery was alleged by the claimants to have been altered by a verbal agreement between the parties for their mutual convenience.

A. T. Miller, K.C., and *R. E. Gething* for the claimants : The original contract is still in force. The verbal arrangement as to time of delivery was not a new contract, and did not require to be in writing under the Sale of Goods Act or under the Statute of Frauds. It was merely an alteration of the time of performance. Further, the new arrangement was to some extent acted upon. There was therefore a part performance within sect. 4 (2) of the Sale of Goods Act.

J. V. Naisby and *G. N. W. Boyes* for the respondents : The test as to whether or not the alteration resulting from the verbal agreement is a new contract which must be evidenced by writing is if it affected an essential term of the contract. In this case, time of delivery was such a term, and, in the absence of writing, the new contract cannot be enforced. The umpire has held that the agreement was in fact, and was considered by the parties to be, to their mutual advantage. There was therefore consideration moving from both sides to found a contract.

Goddard, J. : The arbitration in which this award in the form of a special case is stated arises out of a contract, between the claimants as buyers and the respondents as sellers, of 70,000 tons of coal, made in Nov., 1935. The only question that has to be decided is one under sect. 4 of the Sale of Goods Act, and for this purpose the facts can be very shortly stated.

On Oct. 10, 1935, the respondents sold to the claimants 40,000 tons of coal, to be delivered in equal monthly quantities from Jan. 1 to June 30, 1936. Soon after this contract was made, the claimants' representative asked that deliveries, if possible, should be expedited, and the respon- A
dents' representative, while giving no undertaking, promised to do this if it were possible. Then, on Nov. 6, the contract in question was made, providing for equal monthly deliveries between Apr. 1 and Dec. 31, 1936. In Apr., 1936, while deliveries under the October contract were still being made, and while deliveries under the subsequent contract B
were due to begin, the representatives of the parties met and discussed the situation. Deliveries under the October contract had not been expedited, so that, from April to June, 1936, deliveries under both contracts would be due to be made and received.

The representatives came to what the arbitrator refers to as a verbal C
agreement that deliveries under the later contract should not begin till the deliveries under the former had finished, and that the deliveries should proceed, and the coal undelivered under the later contract on Dec. 31 should thereafter be delivered to the claimants under the later contract. But he does not find that the balance should be delivered in monthly, D
or in any, instalments, finding, as I understand the case, that there was no agreement on this point. This agreement, he finds, was for the mutual convenience of the parties, and was so considered by them. It was convenient for the buyers, as their customers had no great amount of storage room, and it was convenient for the sellers, because they E
were considering closing down one of their pits, in which case it would have been difficult for them to keep up double deliveries, and, accordingly, no deliveries were made under the later contract till July.

On Dec. 1, 1936, however, the sellers wrote to the effect that, as the buyers had not taken delivery in accordance with the terms of the con- F
tract of Nov. 6, 1935, they declined to deliver any coal after Dec. 31. The buyers claim damages for non-delivery, and the arbitrator has found that, as the agreement come to in Apr., 1936, for postponing delivery was not in writing, sect. 4 of the Sale of Goods Act is an answer to this claim, and he has awarded, subject to this case, that nothing is due G
by way of damages. He has also awarded that the buyers cannot claim specific performance of the contract, and that finding is not challenged, as, of course, coal could have been bought eleswhere, though at a higher price.

Mr. Miller, for the claimants, the buyers, took three points: (i) that, H
on the findings of what took place in Apr., 1936, there was not a new contract, but only a postponement of delivery, and that the contract remained in operation subject to a modification as to delivery; (ii) that, if there was a new contract, it was not one for sale of goods, but for the delivery of goods already sold; and (iii) that, alternatively, if there was

a new contract in April, it had been partly performed by the deliveries that were made between July, 1936—when deliveries of the 70,000 tons began—and Dec., 1936, and therefore the provisions of sect. 4 are satisfied.

The first two contentions can, I think, be dealt with together, and, on this part of the case, a large number of cases was cited by each side, those most discussed being *Stead* v. *Dawber* (1), *Tyers* v. *Rosedale & Ferryhill Iron Co.* (2), *Leather Cloth Co.* v. *Hieronimus* (3), *Hickman* v. *Haynes* (4), *Plevins* v. *Downing* (5), and *Morris* v. *Baron & Co.* (6).

It often happens, when either sect. 4 or sect. 17 of the Statute of Frauds, now replaced by sect. 4 of the Sale of Goods Act, has to be considered, that the cases are found to be somewhat difficult of reconciliation, and this case is no exception. In *Stead* v. *Dawber* (1), the court found it difficult to reconcile the case of *Goss* v. *Nugent (Lord)* (7) with *Cuff* v. *Penn* (8), and *Stead* v. *Dawber* (1), though the facts were very similar, had in turn to be distinguished by the court in *Hickman* v. *Haynes* (4).

Mr. Miller relied strongly on the judgment of MARTIN, B., in *Tyers* v. *Rosedale & Ferryhill Iron Co.* (2), which was upheld when that case went to the Exchequer Chamber. In that case, the plaintiffs had requested the defendants to forbear from delivering certain instalments, and, accordingly, only partial deliveries were made, and then, at the end of the contract period, the buyers demanded delivery of the residue. MARTIN, B., in a dissenting judgment, held that the original contract had not been terminated, and dealt with the objection that the plaintiffs' right to recover was barred by sect. 17, as not being in writing, by saying:

> It [the variation] was not a contract for the sale of goods, but a contract respecting the delivery of goods already sold, which is not within the section at all.

However, when that case went to the Exchequer Chamber, counsel for the defendants abandoned this point, because, as I understand the case, if writing were required, there was enough to supply a memorandum, and I feel a difficulty in holding that the approval which the Exchequer Chamber gave to the judgment of MARTIN, B., who had differed from the rest of the court below on the question as to whether the original contract was rescinded, necessarily extended to this part of his judgment.

With all respect to the high authority of MARTIN, B., it seems to me that a term as to delivery is a term of the sale, and that, if that term be altered, it is an alteration of the terms of the contract of sale. This was, I think, the ground of the decision in *Stead* v. *Dawber* (1), which Mr. Naisby contended was conclusive in his favour. *Stead* v. *Dawber* (1) was, however, as I have said, distinguished in *Hickman* v. *Haynes* (4), another case of a verbal request to allow instalments to stand over, where it was held that the statute was no answer. In the following year, in *Plevins* v. *Downing* (5), a very similar case, it was decided that it was.

One must therefore try to find the underlying principle which will explain the different results in cases which at first sight appear to be so alike in point of fact. From these two last-cited cases I think it is possible to extract a principle, and it seems to me to be this: If the parties agree to rescind their original contract, and to substitute for it a new one, the latter must be evidenced by writing. So, too, if, as a matter of contract, the parties agree that the terms of the original agreement shall be varied, the variation must be in writing. But if what happens is a mere voluntary forbearance to insist on delivery or acceptance according to the strict terms of the written contract, the original contract remains unaffected, and the obligation to deliver and to accept the full contract quantity still continues.

This view is supported by the opinion of LORD ATKINSON in *Morris* v. *Baron & Co.* (6), at p. 30, where he said:

> In *Maddison* v. *Alderson* (9) LORD BLACKBURN said: "I think it is now finally settled that the true construction of the Statute of Frauds, both sect. 4 and sect. 17, is not to render the contracts within them void, still less illegal, but is to render the kind of evidence required indispensable when it is sought to enforce the contract." I do not find that it was ever seriously questioned that this was the true state of the law as to sect. 4 of the Statute of Frauds. The doubt was as to whether the same rule applied to sect. 17, or whether contracts within it not in writing where none of the particular matters specified had been done were not absolutely void. There is nothing in all this inconsistent with the well-established rule that a contract which the law requires to be evidenced by writing cannot be varied by parol. . . . The foundation, I think, on which that rule rests is that after the agreed variation the contract of the parties is not the original contract which had been reduced into writing, but that contract as varied, that of this latter in its entirety there is no written evidence, and it therefore cannot in its entirety be enforced. There is a clear distinction, however, between cases such as these and cases like *Ogle* v. *Vane (Earl)* (10), where one party at the request of and for the convenience of the other forbears to perform the contract in some particular respect strictly according to its letter. As, for instance, where one party, bound to deliver goods sold upon a certain day, at the request of and for the convenience of the other postpones delivery to a later day. In such a case the contract is not varied at all, but the mode and manner of its performance is, for the reasons mentioned, altered.

It does not appear to me to matter whether the request comes from one side or from the other, or whether it is a matter which is convenient to one party or to both. What is of importance is whether it is a mere forbearance or a matter of contract. This, I think, is made clear by *Plevins* v. *Downing* (5), where BRETT, J., emphasises the distinction between the situation where the party suing was always ready and willing to perform his contract, and merely abstained at the request of the other party, and where, if he sued for non-acceptance or non-delivery, he would be driven to rely on the assent of the other party to allow him to vary the terms of the original contract.

If, however, one party asks the other if he would refrain from delivering, and the other party says it would suit him very well to do so, both parties being able and willing to perform their obligations, I think we get the same position as that which is envisaged by *Hickman* v. *Haynes* (4), and by LORD ATKINSON in the passage to which I have referred.

It then has to be determined on which side of the line this case falls. Mr. Naisby relies on the fact that the arbitrator has found that there was a verbal agreement, but I do not think that the use of those words concludes the matter. Whether it be a forbearance or a matter of contract, there is, none the less, an agreement. There is an agreement between parties, though, for want of consideration, or because of the provisions of an Act of Parliament, their agreement must be regarded as *nudum pactum*, or as void. One must have regard to the facts found by the arbitrator. What happened was a conversation, which arose, as it seems to me, because one party had not been able to expedite deliveries under an earlier contract, as he had promised, but not undertaken, to do if he could. Neither party thought the matter worth confirming in writing, and the vendors' representative did not even inform his directors of the matter, and no inquiry was made, or pressure applied, during the contract period. In these circumstances, I think that one is driven to the conclusion that this was no more than a mere forbearance, and voluntary, in the sense that either party could have resiled, and called upon the other to make or take delivery in accordance with the terms of the written contract. Accordingly, I hold that the statute is not an answer to the buyers' claim.

This, in effect, disposes of the case, but I think that I ought to deal with Mr. Miller's contention as to part delivery, particularly as I am afraid that he thought I did not pay enough attention to it in argument, though in fact it seemed to me an interesting point. He contends that, as deliveries were made after the parties had agreed to the modification, he is entitled to prove the actual contract, and to rely on the part delivery as taking the case out of sect. 4.

But the difficulty in the way of accepting this argument, to my mind, is this. *Morris* v. *Baron & Co.* (6) has decided that there is a real distinction between varying an existing contract and rescinding a contract and substituting for it a new agreement. If the arbitrator had found, or if the facts had shown, that the parties had rescinded their contract of Nov. 6, and had substituted for it a fresh one, under which deliveries were not to begin till July, in my opinion, Mr. Miller's contention would have been right. But the arbitrator has not found this, and it is, I think, clear that nothing of the sort happened. I think that the parties would have been very surprised if they had been told that they had rescinded the contract of Nov. 6, 1935, by the conversation in the following April. Therefore, it was under that contract that the part deliveries were made, and, if evidence were given that the parties had agreed as a matter of contract that the deliveries should be altered from April/December to July/April, it would have been open to the objection that it was inconsistent with the terms of the written document.

Had it been a matter of adding a term, so that the agreement was partly written and partly oral, and part deliveries were made thereunder, it would have been different, but it seems to me that what has been found, if it be a matter of contract, contradicts, or at least is inconsistent with, the document. I do not think, therefore, that part delivery would be an answer to the statute, if it applied.

Accordingly, I answer the questions propounded in para. 28 of the award as follows: The award contained in para. 24, which deals with specific performance only, is correct. The award contained in para. 25 is incorrect. I uphold the award contained in para. 31.

I may add that I understand that award to be based on the difference between the contract price and the price prevailing immediately after A
Dec. 31, 1936, and the buyers have not suggested that they are entitled to any other measure of damage. The buyers will have the costs of this arbitration.

Solicitors: *Bentleys, Stokes & Lowless*, agents for *Bramwell, Clayton & Clayton*, Newcastle-upon-Tyne (for the claimants); *King, Wigg & Brightman*, agents for *Wilkinson & Marshall*, Newcastle-upon-Tyne (for the respondents.) B

C

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

BURDEN *v.* HARRIS.

[KING'S BENCH DIVISION (Lawrence, J.), **October 25, 27, 1937.**]

Gaming—Recovery of winnings—New consideration—Forbearing to report defaulter to Tattersalls—Whether illegal as extortion—Larceny Act, 1916 (*c.* 50), *s.* 31.

The plaintiff, having won a bet with the defendant, a bookmaker, had difficulty in obtaining payment, and ultimately the defendant promised to pay by instalments in consideration of the plaintiff not reporting him to Tattersalls Committee. It was contended that the agreement not to report to that committee was extorting of money within the Larceny Act, 1916, s. 31, and therefore illegal:—

HELD: the taking of every step which can be taken by way of reporting defaulters to Tattersalls is not an extorting within the Larceny Act, 1916, s. 31.

[**EDITORIAL NOTE.** An attempt was made in this case to disturb the decision in *Hyams* v. *Stuart King* (1) by contending that a suggestion that, in default of payment, the matter shall be reported to Tattersalls is illegal as being blackmail. It is held, however, that this view of the matter was present to the minds of the court in that case, and, therefore, that authority is still binding.

AS TO FRESH PROMISE MADE FOR NEW CONSIDERATION, see HALSBURY, Hailsham Edn., Vol. 15, pp. 476, 477, para. 873; and FOR CASES, see DIGEST, Vol. 25, pp. 400-403, Nos. 54-70.]

Case referred to:

(1) *Hyams* v. *Stuart King*, [1908] 2 K.B. 696; 25 Digest 401, *58*; 77 L.J.K.B. 794; 99 L.T. 424.

ACTION to recover the sum of £100, alleged to be due under an agreement, the latter being an agreement to give time and not to report a defaulter to Tattersalls in respect of the non-payment of a gaming debt.

H. H. Hanworth for the plaintiff.

R. E. Manningham-Buller for the defendant.

LAWRENCE, J.: In this case, the plaintiff is suing to recover the sum of £100 which he alleges is due under an agreement of Sept. 3, 1935. The action arises out of a bet which the plaintiff made with the defendant, who is a bookmaker, and who, according to his own account, has been warned off Newmarket Heath on many occasions. The bet was won by the plaintiff on the Ascot stakes, and thereafter the plaintiff applied on several occasions to the defendant for payment, but was always put off by the defendant's manager, who, so far as the plaintiff knew, was apparently the proprietor of the business. He was in fact the manager, a Mr. Griffiths.

On Sept. 3, the plaintiff went again to the defendant's premises, and told the defendant's manager that he proposed to report the defendant to Tattersalls Committee unless he paid. The account which the plaintiff gives of that interview, which I accept as being a truthful account, is that he said that if he did not receive payment he would have to take the defendant before Tattersalls Committee, to which the defendant's manager replied:

> Do not do that. I will pay you in instalments of £5 or £10, and will settle the balance immediately after the Cesarewitch.

Then, after some further conversation, it was agreed that, in consideration of the plaintiff doing nothing further, and not reporting him to Tattersalls, the defendant should pay in these instalments, and the balance after the Cesarewitch. Upon that evidence, which I accept in preference to the evidence of the defendant and his manager, I find that the defendant promised to pay by instalments the amount of the debt, and the balance after the Cesarewitch in consideration of the plaintiff's agreeing not to report him to Tattersalls or to press him in any other way. I find as a fact, and am satisfied, that that was the agreement which was arrived at between the plaintiff and the defendant on Sept. 3. Such an agreement is a valid agreement, being a new agreement which is not void under the Gaming Act, in accordance with the decision in *Hyams* v. *Stuart King* (1), an authority of the Court of Appeal which has been followed ever since.

It was then argued that, pursuant to the Larceny Act, 1916, s. 31, which is a reproduction of the Libel Act, 1843, s. 3, it is illegal, and indeed criminal, to enter into any such arrangement as was held by the Court of Appeal in the case of *Hyams* v. *Stuart King* (1) to be legal. It was argued that that point was never drawn to the attention of the Court of Appeal in *Hyams* v. *Stuart King* (1), and that it has never been drawn to the attention of any court in the cases which have subsequently been held. In my opinion, there is no substance in that point. The words of the Larceny Act, 1916, s. 31, are:

> Every person who with intent (*a*) to extort any valuable thing from any person . . . or (*b*) directly or indirectly threatens to print or publish, or directly or indirectly proposes to abstain from or offers to prevent the printing or publishing of any matter or thing touching any other person . . . shall be guilty of a misdemeanour.

It is sufficient for me to say that, in my opinion, it is not extorting within the meaning of sect. 31 to take every step which can be taken by way of reporting defaulters to Tattersalls. That is the view which seems to have been taken by the Court of Appeal in *Hyams* v. *Stuart King* (1), and is explicitly taken by Farwell, L.J., at pp. 725, 726, where he says:

> So long as lost bets are regarded as debts of honour, I cannot bring myself to describe as blackmail the use by the man aggrieved of the ordinary means allowed by society to compel the loser to comply with the dictates of honour.

It is true that the Larceny Act, 1916, s. 31, had not then been passed, but the Libel Act, 1843, s. 3, was in existence, and, although it does not appear as being expressly brought to the notice of the court, I am satisfied that Farwell, L.J., was expressing his opinion as to the whole law of blackmail in the passage which I have cited, and I respectfully concur in the words which he used. I therefore hold that sect. 31 has no application to the facts of this case, and that there is, therefore, nothing illegal in the agreement which I find was made between the plaintiff and the defendant on Sept. 3, 1935, and I accordingly give judgment for the plaintiff for £100 and costs.

Solicitors: *Leslie Marrison* (for the plaintiff); *Percy Bono & Griffith* (for the defendant).

[*Reported by* W. J. Alderman, Esq., *Barrister-at-Law.*]

Re JOHNSON & JOHNSON (GREAT BRITAIN), LTD.'S, PATENT.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Romer and MacKinnon, L.JJ.), **October 12, 13, 14, November 26, 1937.]**

Patents—Practice—Application to the comptroller to revoke—Matters which may not be considered by the comptroller—Want of utility, prior user, want of subject-matter—Application to amend specification—Restrictions on amendments under sect. 11—*Patents and Designs Acts,* 1907-1932, *ss.* 11, 21, 25, 26.

The respondents had applied to the comptroller, under the provisions of the Patents and Designs Acts, 1907-1932, s. 26, to revoke a patent which had been granted to the appellants, and which was entitled "Improvements in or relating to waterproof fabrics and the production thereof." The ground of the application was that the specification did not sufficiently and fairly describe the invention. The specification described a process involving "frictional calendering," whereas the patentee's product was in fact usually produced by a process in which there was no friction between the bottom two rollers of the calender. An application was made to amend the specification by confining the friction calendering to the case where there was friction between the upper two rollers of the calender only. It was contended that an amendment of a type allowable under sect. 11 would have deprived the comptroller of any justification for refusing to grant a patent, and that the same amendment ought to be allowed in the present proceedings:—

HELD: (i) the term "friction calendering" could extend to cases where there was no friction between the bottom two rollers, and in that respect the invention was sufficiently and fairly described.

(ii) there is an implied authority in the comptroller to allow amendments under sect. 11, but such amendments must be restricted, in the same manner as those allowed under sects. 21, 22 and 26, to matters of disclaimer, correction, or explanation.

(iii) the amendment sought was one properly described as an amendment by way of disclaimer, and so would have been permissible, had the court not held the patent invalid on other grounds.

(iv) the practice of considering want of utility, prior user, or want of subject-matter in opposition proceedings under sect. 11 or in revocation proceedings brought under sect. 26 is in direct conflict with the express provisions of the Act, whereby the comptroller is restricted to the grounds specifically set out in sect. 11 (1). These matters can be inquired into by the court only in infringement actions or in petitions made to it for revocation under sect. 25.

R. v. *Comptroller-General of Patents, Ex p. Muntz* (1) *and Re Eveno's Patent* (3) *considered.*

[EDITORIAL NOTE. There has been a practice in the Patent Office of considering want of subject-matter, prior user, and want of utility in opposition proceedings under sect. 11 and on applications to the comptroller to revoke a patent under sect. 26 of the Act. This practice is contrary to the express provisions of the Act, as these matters can be considered by the court only in infringement actions or in applications to revoke a patent made to the court under sect. 25 of the Act. The comptroller is restricted to considering matters specifically mentioned in sect. 11 (1). There is an implied power in the comptroller to allow amendments under sect. 11, and it was suggested that the Office would allow amendments wider in scope than those allowed by the Act under sects. 21, 22 and 26. The court has, however, said that such amendments are restricted in a similar manner to those made under sects. 21, 22 and 26—that is to matters of correction, explanation, and disclaimer.

AS TO REVOCATION, see HALSBURY, Hailsham Edn., Vol. 24, pp. 701-704, paras. 1306-1310; and for Cases, see DIGEST, Vol. 36, pp. 734-739, Nos. 2222-2261.]

Cases referred to:

(1) *R.* v. *Comptroller-General of Patents, Ex p. Muntz* (1922), 127 L.T. 547; 36 Digest 609, *717*; 39 R.P.C. 335.

(2) *Re Compagnies Réunies des Glaces et Verres Spéciaux du Nord de la France* (1930), 48 R.P.C. 185. A

(3) *Re Eveno's Patent*, [1932] 2 Ch. 167; Digest Supp.; 101 L.J. Ch. 395; 147 L.T. 478; 49 R.P.C. 385.

Appeal by the registered proprietors of letters patent No. 387,125 from an order of Luxmoore, J., dated Nov. 19, 1936. B

Sir Stafford Cripps, K.C., and *Lionel F. Heald, K.C.*, for the appellants.

R. Moritz, K.C., and *G. W. S. Marlow* for the respondents.

Romer, L.J. [delivering the judgment of the court]: This is an appeal from an order made by Luxmoore, J., affirming the revocation C by the assistant comptroller of the appellants' Patent No. 387,125, on the application of the respondent made under the provisions of the Patents and Designs Acts, 1907-1932, s. 26. The powers of the comptroller under that section are stated under subsect. (2) thereof to be that he D

> may make an order revoking the patent or requiring the specification relating thereto to be amended by disclaimer, correction or explanation, or dismissing the application; but the comptroller shall not make an order revoking the patent unless the circumstances are such as would have justified him in refusing to grant the patent had the proceedings been proceedings in an opposition to the grant of a patent.

E

The grounds upon which the comptroller may refuse to grant a patent after acceptance of the complete specification are strictly defined in sect. 11 (1) of the Act, in paras. (*a*) to (*e*). The enumeration of the grounds concludes with these words: "but on no other ground." Of the grounds there stated, the only one that is material to the present F case is that in para. (*c*):

> that the nature of the invention or the manner in which it is to be performed is not sufficiently and fairly described and ascertained in the complete specification.

It was on this ground that the assistant comptroller revoked the patent in the present case, and was upheld by Luxmoore, J., in so doing. Both G before the assistant comptroller and before the judge the appellants unsuccessfully sought leave to amend the specification in various particulars which it is unnecessary to mention in detail, inasmuch as before us the appellants confined their application to amend to two matters that will be mentioned in a later part of this judgment. For the present, H we will consider whether the nature of the invention and the manner in which it is to be performed are or are not sufficiently and fairly described in the specification as unamended.

The specification is entitled, "Improvements in or relating to waterproof fabrics and the production thereof," and the invention is described as one that provides a waterproof fabric possessed of certain definite, distinctive and novel characteristics. The specification then goes on to indicate what these characteristics are. It states that, at the date of the invention, the waterproof properties of liquid coating compositions, such as reaction condensation products, having resin characteristics, were A well known, and that it had been proposed to make fabrics waterproof by treating them with reactive resinous materials, the liquid coating composition being generally applied by dipping or by spraying, a process more or less satisfactory where relatively heavy gauge or non-uniformity of thickness of coating was of no moment, and where stiffness or tackiness B was not a problem.

The patentees then state that attempts to perfect the practice by calendering had failed, because none of the known materials would lend themselves to known methods of calendering, and they set out the nature of their invention and the characteristics that will be possessed by a C waterproof fabric made in accordance with such invention:

> The nature of the invention resides in the method, and in the product of that method, which in one aspect consists in the selection and treatment of a reactive resin composition to condition it for successful application by calendering or otherwise, and in another aspect consists in the method of calendering, or, in short, proper application of that material, for the ultimate purpose and result of producing a waterproof fabric, characterised by its marked flexibility, uniformity of D gauge or thickness, and by its stability and freedom from tackiness over long periods of time, regardless of exposure to different temperature conditions.

The words "or otherwise" in this passage seem to suggest that the patentees contemplated making a claim to cover the reactive resin itself, in whatever way it might be applied. There is no such claim, E however, in fact, and the words can be disregarded. The invention, therefore, is of a method of making a waterproof fabric, and of the product of that method, the method consisting in the selection and treatment of the waterproofing material, and in the calendering of that material on to the fabric to be made waterproof.

F At this point, it is necessary to explain what is meant by the term "calendering" as used in connection with the waterproofing industry. It is the name applied to a process carried out by a machine in which three revolving rollers are placed vertically one above the other. The waterproofing material is passed between the upper and middle rollers, G and emerges from them in sheet form. It is then passed, together with the fabric that is to be made waterproof, between the middle and the bottom rollers, for the purpose of causing the sheet to adhere to the fabric. Sometimes two adjacent rollers are moving, as they can be made to move, at different speeds. In such a case, there will be friction H between such two rollers.

Returning to the specification, it will be found that the patentees state that, in the practice of the invention, considerable care should be exercised in preparing the proper coating material, and in properly treating it so that it will readily lend itself to successful application, by which they mean successful friction calendering. This is the first use

of the term "friction calendering" in the specification. As we have already indicated, there may be, in a calendering machine, friction between the two upper rollers, and also between the two lower rollers, or between one of such pairs of rollers and not between the other pair. In the case of calendering when there is friction between the two upper rollers only, we should have thought that the calendering operation as A
a whole might well be described as friction calendering, in spite of the absence of friction between the two bottom rollers, that is, the rollers that cause the sheet of waterproofing material to adhere to the fabric. Whether the patentees have so used the term, or whether they intend by the term to indicate the existence of friction between the two bottom B
rollers as well, is a question in controversy between the parties to this appeal. In the passage to which we have just referred, it is the application of the coating material to which the term is applied, and it is said by the respondents that this indicates that friction is contemplated as occurring in the last stage of the calendering operation, that is to say, C
the stage in which the coating is applied to the fabric which is brought between the two bottom rollers, and not merely in the first stage of the operation where the coating material is made to assume a sheet form that can be then made to adhere to the fabric.

The only other reference to friction calendering to be found in the D
body of the specification is in a passage where the patentees say:

> A mass of the unformed amorphous material from the cold rolls is then friction calendered on to a base such as cloth.

This again, it is argued, indicates that the friction referred to is used in the later phase of the calendering operation. But the whole calender- E
ing operation is one by means of which a coating material, not yet in sheet form, is applied to—that is to say, is made to adhere to—the fabric, and the operation consists of two steps. The coating material is passed between the two upper rollers. These two rollers move at different speeds, and by the friction thereby engendered the coating F
material is made to assume a sheet form, and in that form passes between the two lower rollers. The application of the coating material to the fabric is therefore accomplished by two steps, each step being an essential part of the calendering. In these circumstances, we are of opinion that the coating material may properly be said to be applied to the fabric G
by friction calendering, or to be "friction calendered" on to the fabric, even when there is no friction between the two bottom rollers. In other words, the term "friction calendering" does not necessarily import that the two bottom rollers are to be revolved at different speeds. It does not, on the other hand, necessarily exclude the case of calendering H
with friction between both the two pairs of rollers, and must, therefore, in our opinion, be regarded as covering both cases. [His Lordship considered the specification in detail, and held that in other respects than those discussed above the invention was not sufficiently or fairly described.] In those circumstances, it is quite impossible to say that

the nature of the patentees' invention is sufficiently and fairly described in the complete specification, and it is obvious that an amendment of the specification by the omission of the word "semi-rubbery" on p. 2, line 44, of the specification will not help matters. Whatever name be applied to the product in question, the specification will still contain A the two mutually contradictory indications that the waterproofing material covered by the first three claims is and is not that product without it having been subjected to the milling operation. This is sufficient to dispose of the appeal. The patentees have failed to describe sufficiently and fairly the nature of their invention and the manner in B which it is to be performed.

This appears to have been the view taken by the assistant comptroller and LUXMOORE, J. But they also thought that the patent ought to be revoked, on the ground that, even as regards the calendering operation, the patentees had failed to describe sufficiently and fairly the nature of C their invention. Their view, stated shortly, was that the patentees had not made it clear whether, in the calendering operation, there was or was not to be friction between the two bottom rollers. We are not prepared to take this view. For the reasons we have given in an earlier part of this judgment, we think that, according to the true construction D of the specification, the patentees have indicated that there may be some such friction for the purpose of securing the controlled penetration of the coating into the interstices or voids of the foundation fabric without penetration into the fibres of the fabric itself, this being what we understand the patentees to mean in claim 1 when they speak of the E coating being substantially confined to the surface of the fabric. On the other hand, we cannot find that they have excluded the possibility of any such friction. In other words, we are of opinion that the patentees' claims, on their true construction, cover both the case of calendering with friction between the bottom rollers and the case of F calendering without it, according to the amount of penetration desired. It is true that there seems to be ground for thinking that, in order to get the limited penetration that constitutes the characteristic feature of their invention, there must in fact be no friction at all between the bottom rollers. If this should prove to be true, then, in an action in G which the validity of the patent came into question, the patent should be declared to be invalid on the ground of want of utility. The calendering with friction between the two bottom rollers would not give the desired result. In our judgment, however, the patent could not be revoked on this ground by proceedings taken under sect. 26 of the Act.

H There appears to prevail in the comptroller's office, in the case of opposition proceedings under sect. 11 of the Act, and of proceedings under sect. 26 of the Act, a practice of taking into consideration matters that can properly be considered only in proceedings to obtain revocation of a patent by the court under sect. 25. Such matters, for instance, as want of utility, prior user, or want of subject-matter. In our judgment, this practice is in direct conflict with the express provisions of the Act. As we have already pointed out in an earlier part of this judgment, the grounds upon which opposition proceedings under sect. 11 may be based are specified with particularity in that section, the enumeration concluding with the words "but on no other ground." In proceedings under sect. 26, the comptroller is in terms prohibited from acting on any A other grounds. He may not make an order revoking the patent

> unless the circumstances are such as would have justified him in refusing to grant the patent had the proceedings been proceedings in an opposition to the grant of the patent.

Among the grounds specified in sect. 11, neither want of utility, prior user B nor want of subject-matter is included. On the other hand, the grounds on which the court may revoke a patent are set out in sect. 25 (2), and all the matters just referred to are there included. Their omission from sect. 11 is significant, and must have been intentional. Nor is the reason for their omission far to seek. Questions of utility, prior user C and subject-matter as a rule depend for their solution upon the proper conclusion to be drawn from the conflicting oral evidence of experts in the relevant art, and such evidence would be wholly out of place in proceedings before the comptroller. The practice to which we have referred should therefore be discontinued. Justification for the practice D is thought to be afforded by the decision of the Divisional Court in *R.* v. *Comptroller-General of Patents, Ex p. Muntz* (1), but, in truth, that case, when closely examined, in no way justifies the practice. In that case, the comptroller's representative had refused to accept an application for letters patent, and the applicant had obtained a rule *nisi* for a E *mandamus* addressed to the comptroller or his representative to hear and determine the application according to law. The rule *nisi* was granted upon the ground that the comptroller had exceeded the jurisdiction given him by the Acts by deciding that the invention claimed was not a "manner of new manufacture," or, alternatively, while pur- F porting to decide the case upon the said ground, by, in fact, deciding the case upon the ground of want of subject-matter.

But, upon showing cause against the rule, the comptroller's representative stated on affidavit that the ground on which he had refused acceptance of the complete specification was that the applicant was claiming G a patent for a mere idea. In other words, that the patent sought was not one for a manner of manufacture. He said:

> It is submitted that the Comptroller-General has an inherent jurisdiction to refuse the grant of letters patent under the seal of the Patent Office on an application in which the complete specification filed in connection therewith does not H disclose an "invention" which is a "manner of manufacture" within the meaning of sect. 6 of the Statute of Monopolies, and an invention within the meaning of this word as used in the Patents and Designs Acts, 1907 and 1919. In making my said decision I did not in any way take into account any considerations as to the novelty of the said invention. The question of novelty did not arise. I am not sure in what sense William Edgar Muntz uses the phrase "want of subject-matter" in para. 3 of his said affidavit. If he uses it, as he appears to do, in the sense in which those words are ordinarily used by His Majesty's judges in deciding issues as

> to the validity of letters patent, namely, that the new matter (if any) disclosed and claimed in a patent specification did not require any act of invention, then I deny that my decision was in any way based upon the ground of "want of subject-matter."

The deponent was not therefore seeking to justify any such practice as that to which we have referred above. He was merely contending, and rightly contending, that, inasmuch as the specification on the face of it disclosed an idea only, and not a manner of manufacture, there was no disclosure of an invention within the meaning of the Act. Invention is defined by sect. 93 of the Act as follows :

> Invention means any manner of new manufacture the subject of letters patent and grant of privilege within sect. 6 of the Statute of Monopolies and includes an alleged invention.

It was on these words "alleged invention" that the contention of the applicant was based. If he, the claimant for a patent, alleged that he was in possession of an invention, it was not for the comptroller, so it was argued, to investigate the truth of that allegation. It was this contention that was rejected by Lord Hewart, L.C.J. After referring to the definition of the word "invention" in sect. 93, he said :

> When one turns to the Statute of Monopolies there it is made plain that what is spoken of as an invention is "some manner of new manufacture," and although in the Act of 1907, as indeed in the Act of 1883, the words "alleged invention" were employed, it is quite clear, as has been declared by more than one law officer, and as one would expect apart from any expression of opinion in any quarter, that the word "alleged" in the definition goes only to the epithet "new" and does not make that an invention which is not a manner of new manufacture, but which the alleged inventor chooses to describe as an invention.

With these observations of Lord Hewart, L.C.J., we desire to express our respectful concurrence. The question whether or not a specification discloses a manner of manufacture is one for the comptroller. The question whether, apart from prior publications and prior claims such as are specifically dealt with in sect. 11 (1) (*b*) (*bb*), the manner of manufacture is "new" is not one with which the comptroller is concerned, as has been very clearly pointed out by Sir Stafford Cripps, when Solicitor-General, in the case of the application for a patent by *Compagnies Réunies des Glaces* (2). In other words, a manner of manufacture alleged to be new is an invention within the meaning of the Act. The truth of that allegation is a matter that can be inquired into by the court only on a petition for revocation or in an action for infringement. This does not, however, mean that the comptroller is bound to accept the allegation of the applicant that his method of manufacture is new, if it is apparent upon the face of the specification, when properly construed, that the allegation is unfounded. In order to construe the specification properly, the comptroller must, of course, have regard to the meaning that would be attributed to its language by those skilled in the relevant art, and, for the purpose of ascertaining such meaning, he is entitled to receive evidence. But if the specification, when so construed, shows that the applicant is claiming a manner of manufacture that he alleges to be new, and the specification, when so construed, does not itself show that allegation to be unfounded, evidence directed to establishing want of subject-matter or want of utility or prior user is not permissible.

One further matter remains to be mentioned. The patentees in the present case have failed to describe sufficiently and fairly the nature of their invention and the manner in which it is to be performed, in that it is impossible to ascertain, on the face of the specification, what is the waterproofing material with which their invention is concerned. Had they described and ascertained that material sufficiently and fairly, it would have become necessary to consider the application made to us on behalf of the appellants for leave to amend the specification by inserting on p. 1, line 95, the following words:

> The expression "friction calendering" when used in this specification means an operation employing rolls to form under a friction rolling action from a plastic coating composition a coherent sheet or film of substantially uniform thickness or gauge, and to apply such sheet or film by a rolling action without friction on to a foundation fabric.

As the application raises a question of considerable general importance, it is desirable, even though it is not strictly necessary, that we should say something about it.

We have already expressed our opinion that the term "friction calendering" in the specification includes calendering either with or without friction between the two bottom rollers, in addition to friction between the two upper rollers. Whether, so construed, the patent could be invalidated on the ground of want of patentable utility is a matter with which we are not concerned at this stage, for the reasons that we have already given. But, under sect. 26 of the Act, the comptroller has power to require the specification to be amended by disclaimer, correction or explanation. He therefore has power, and the court on this appeal has power, to allow the appellants to amend their specification by confining the friction calendering to the case where there is friction between the two upper rollers only. For such an amendment would, in our judgment, be properly described as an amendment by way of disclaimer. It is argued, however, on behalf of the respondents, that such an amendment would make the specification as amended claim an invention substantially different from the invention claimed by the specification as it stood before the amendment, within the meaning of sect. 21 (6) of the Act. That is the section which enables an applicant after acceptance, or a patentee at any time, by taking the proceedings therein mentioned, to amend his specification by way of disclaimer, correction or explanation. Sect. 21 (6) is in these terms:

> No amendment shall be allowed that would make the specification, as amended, claim an invention substantially larger than or substantially different from the invention claimed by the specification as it stood before the amendment.

A similar restriction is contained in the proviso to sect. 22, which is the section that enables the court to allow an amendment in an action for infringement or in proceedings for revocation.

Two questions arise upon this argument of the respondents. The first is whether a similar restriction on amendment applies to an amendment made under the powers conferred by sect. 26. The second is whether, if the restriction does so apply, the particular amendment is inadmissible. In our judgment, the first question must be answered in the affirmative. It was so answered by LUXMOORE, J., in *Re Eveno's Patent* (3), and with that decision we respectfully agree. It appears, however, that, in proceedings under sect. 11, it is the practice of the comptroller to allow amendments without any such restriction. It is accordingly argued on the appellants' behalf that, if a particular amendment would have deprived the comptroller of justification for refusing to grant the patent in proceedings under sect. 11, the same amendment must necessarily be admissible in proceedings under sect. 26, since the comptroller is forbidden by the latter section to revoke a patent unless the circumstances are such that they would have justified him in refusing to grant the patent. The argument is sound if the assumption upon which it is founded be sound—that is, that, in opposition proceedings under sect. 11 amendments of any kind are permissible. In our judgment, the assumption is without justification. Under sect. 11 no express powers of amendment are given to anybody, and, though we do not desire to throw any doubt upon there being an implied power in the comptroller to allow amendments in opposition proceedings, such implied power must, we think, be treated as being subject to the same restrictions as those imposed by the two sections of the Act in which powers of amendment are expressly given.

The second of the two questions arising upon the proposed amendment must, in our judgment, be answered in the negative. The permissible amendments in terms include an amendment by way of disclaimer, and such an amendment must in many cases make the invention substantially smaller than the invention as originally claimed. But this degree of difference from the invention as originally claimed is impliedly permitted, both by reason of the word "disclaimer" and by reason of the express prohibition of an amendment that will make the invention "substantially larger." Except for this permissible degree of difference, the amendment would not make the invention "substantially different" from the one originally claimed. As it is, however, the proposed amendment, though it would have been permissible in happier circumstances, cannot now avail the patentees. The appeal must be dismissed with costs.

Appeal dismissed with costs. Leave to appeal granted.

Solicitors: *R. G. Harrison* (for the appellants); *Cedric H. Akaster* (for the respondents).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

OTTOMAN BANK OF NICOSIA v. CHAKARIAN.

[Privy Council (Lord Thankerton, Lord Wright, Sir George Rankin), **October 18, 19, 21, 22, November 16, 1937.]**

Privy Council—Cyprus—Money—Currency—Contract with Turkish corporation—Pension based on salary—Whether payable on a gold basis.

In 1910, the respondent entered the service of the appellant banking corporation as a probationer, and in 1912 he was placed on the permanent staff. There was no written contract of employment, but he signed a declaration that he had taken knowledge of the regulations governing the pension and superannuation fund adopted by the Direction Générale of the Bank, and that he would adhere strictly to those regulations as forming an integral part of the conditions of his engagement. The contract of employment was governed by Turkish law, and his basic salary (*traitement fixe*) was in Turkish pounds. It was not suggested that there was to be found anywhere in the regulations any contractual conditions which could be described as a " gold clause." He remained in the appellants' service until 1931, when he retired, on the terms that he was entitled to a pension, in accordance with the pension regulations, at the rate of 48 per cent. of the fixed salary received by him on Dec. 31, 1930. This salary, as expressed in Turkish money, was Ltq. 30 a month, and, accordingly, his pension was Ltq. 14.40 per month. Before the War, the currency authorised as legal tender by the Turkish Government was on a gold basis, and the monetary unit was the gold pound. At the date of the contract, his salary was paid to the respondent, and salary was paid to other employees, by means of that currency, in gold coins, save as to fractional amounts. Respondent claimed that he was entitled to be paid his pension in Turkish gold pounds, by which is meant the current value of the bullion content of the Turkish gold coin (or its equivalent in the currency of Cyprus) at the appropriate rates of exchange :—

Held : the original contract was, according to Turkish law, not one to pay the respondent's salary on a gold basis, but a contract to pay him in Turkish pounds in whatever might be legal tender according to Turkish law at the material time.

Ottoman Bank v. *Chakarian* (8) *approved and followed.*
Ottoman Bank of Nicosia v. *Dascalopoulos* (7) *distinguished.*

[EDITORIAL NOTE. In the present case the Board has before it a very considerable body of evidence as to the Turkish currency law, which was not before it in the *Dascalopoulos* case (7), and it was thus enabled to review the decision in that case and bring the law into line with the decision in *Ottoman Bank* v. *Chakarian* (8).

As to Money Expressed in Foreign Currency, see HALSBURY, Hailsham Edn., Vol. 10, pp. 150-152, para. 191 ; and for Cases, see DIGEST, Vol. 35, pp 169-176, Nos. 11-63.]

Cases referred to :

(1) *Adelaide Electric Supply Co., Ltd.* v. *Prudential Assurance Co., Ltd.*, [1934] A.C. 122 ; Digest Supp. ; 103 L.J. Ch. 85 ; 150 L.T. 281.

(2) *Auckland City Council* v. *Alliance Assurance Co., Ltd.*, [1937] A.C. 587 ; [1937] 1 All E.R. 645 ; Digest Supp. ; 106 L.J.P.C. 40 ; 156 L.T. 367.

(3) *Broken Hill Proprietary Co., Ltd.* v. *Latham*, [1933] Ch. 373 ; Digest Supp. ; 102 L.J. Ch. 163 ; 148 L.T. 412.

(4) *Re Chesterman's Trusts, Mott* v. *Browning*, [1923] 2 Ch. 466 ; 35 Digest 169, *12* ; 93 L.J. Ch. 263 ; 130 L.T. 109.

(5) *Feist* v. *Société Intercommunale Belge d'Électricité*, [1934] A.C. 161 ; Digest Supp. ; 103 L.J. Ch. 41 ; 150 L.T. 41.

(6) *R.* v. *International Trustee for the Protection of Bondholders Akt.*, [1937] A.C. 500 ; [1937] 2 All E.R. 164 ; Digest Supp. ; 106 L.J.K.B. 236 ; 156 L.T. 352.

(7) *Ottoman Bank of Nicosia* v. *Dascalopoulos*, [1934] A.C. 354 ; Digest Supp. ; 103 L.J.P.C. 73 ; 151 L.T. 151.

(8) *Ottoman Bank* v. *Chakarian*, [1930] A.C. 277 ; Digest Supp. ; 99 L.J.P.C. 97.

(9) *Russian Commercial & Industrial Bank* v. *British Bank for Foreign Trade, Ltd.*, [1921] 2 A.C. 438 ; 35 Digest 170, *16* ; 90 L.J.K.B. 1089 ; 126 L.T. 35.

(10) *Manners* v. *Pearson & Son*, [1898] 1 Ch. 581 ; 35 Digest 176, *57* ; 67 L.J. Ch. 304 ; 78 L.T. 432.

(11) *S.S. Celia* v. *S.S. Volturno*, [1921] 2 A.C. 544 ; 35 Digest 174, *39* ; 90 L.J.P. 385 ; 126 L.T. 1.

(12) *Anderson* v. *Equitable Assurance Society of United States* (1926), 134 L.T. 557 ; 35 Digest 176, *62*.

(13) *Buerger* v. *New York Life Assurance Co.* (1927), 96 L.J.K.B. 930 ; Digest Supp. ; 137 L.T. 431.

(14) *Perry* v. *Equitable Life Assurance Society of U.S.A.* (1929), 45 T.L.R. 468 ; Digest Supp.

APPEAL from a judgment of the Supreme Court of Cyprus (THOMAS, J., SIR HENRY STRONGE, C.J., dissenting), dated Apr. 9, 1936, affirming in substance a judgment of the District Court of Nicosia-Kyrenia (RAIF, D.J., and STAVRINIDES, D.J., ABBOTT, P.D.C., dissenting), dated June 21, 1935, whereby it was declared that the respondent was entitled as against the appellants to a monthly pension of 14.40 Turkish pounds gold, or its equivalent in Cyprus currency after conversion at the rate of exchange prevailing on the date of payment of each monthly instalment, as from Sept. 30, 1931.

D. N. Pritt, K.C., *Cyril Radcliffe, K.C.*, *Colin H. Pearson* and *I. W. G. Barry*, for the appellant banking corporation : In *Adelaide Electric Supply Co., Ltd.* v. *Prudential Assurance Co., Ltd.* (1), it is stated at p. 148 : " A debt is not incurred in terms of currency but in terms of units of account." There was no reference to gold in the pensions regulations nor in any other contractual document, and the respondent has failed to prove that, under his original contract, or under any modification or variation of it, he held or acquired any right to receive payment of his salary or pension in specific gold coins, or otherwise in gold, or upon any gold basis. The law of Turkey is the proper law of this contract, or, in any case, the law by which the nature of the respondent's salary and pension, in so far as they were expressed as sums of Turkish pounds, falls to be determined. It was proved that, by Turkish law, the Turkish pounds, referred to in the pension regulations, and in the description of the respondent's fixed salary and pension, were and are Turkish units of account, payable in any form of currency which may be authorised as legal tender by the law of Turkey from time to time. [Counsel referred to *Russian Commercial & Industrial Bank* v. *British Bank for Foreign Trade, Ltd.* (9), *Re Chesterman's Trusts* (4), *Auckland City Council* v. *Alliance Assurance Co., Ltd.* (2), *Ottoman Bank* v. *Chakarian* (8), *Ottoman Bank of Nicosia* v. *Dascalopoulos* (7), *Broken Hill Proprietary Co., Ltd.* v. *Latham* (3).]

Sir William Jowitt, K.C., and *Kenelm Preedy*, for the respondent: On Dec. 31, 1930, the basis of payment of the respondent's salary was Turkish gold pounds, and his pension is payable on that basis. The judgment of the majority of the judges in the District Court of Nicosia-Kyrenia, who held that they were bound by the decision in *Ottoman Bank of Nicosia* v. *Dascalopoulos* (7), was right, as also was that of Thomas, J., in the A Supreme Court. [Counsel referred to *Ottoman Bank* v. *Chakarian* (8), *Manners* v. *Pearson & Son* (10), *S.S. Celia* v. *S.S. Volturno* (11), *Russian Commercial and Industrial Bank* v. *British Bank for Foreign Trade, Ltd.* (9), *Anderson* v. *Equitable Assurance Society of United States* (12), *Buerger* v. *New York Life Assurance Co.* (13), *Perry* v. *Equitable Life* B *Assurance Society of U.S.A.* (14), and The Mejelle, Bk. 3, sect. 1, art. 242, 1901 Edition, translated by C. R. Tyser.]

The judgment of their Lordships was delivered by Lord Wright.

Lord Wright: The question in this appeal is the amount of pension C to which the respondent is entitled on his retirement from the service of the appellants. His claim is that he is entitled to be paid his pension in Turkish gold pounds, by which is meant the current value of the bullion content of the Turkish gold coin (or its equivalent in the currency of Cyprus) at the appropriate rates of exchange. He succeeded in the D courts below, though there were considerable differences of judicial opinion. In the first court, which was the District Court, two judges were in his favour, while the third dissented. In the Supreme Court of Cyprus, there was again a division of opinion. Stronge, C.J., delivered a judgment in favour of the appellants, while Thomas, J., was of the opposite opinion. E The court being equally divided, the judgment of the lower court stood.

The appellants, now called the Ottoman Bank, but previously called the Imperial Ottoman Bank, were established in 1863 by a Turkish Imperial Firman. The head office is at Istanbul, where its affairs are, and have been, administered by a Direction Générale, subject to instruc- F tions given by a committee which meets both in London and in Paris. The appellants have a great many branches. These were, before the War, mainly in various places in the Ottoman Empire. Many of these branches are now, since the War, in countries which no longer form part of that Empire. It also had branches before the War in Greece, Cyprus, Syria G and other countries. The respondent entered the service of the appellants in Oct., 1910, as a probationer at Nazli, in Turkey, and was placed on the permanent staff in Oct., 1912. There was no written contract of employment, but he signed a declaration that he had taken knowledge of the regulations governing the pension and superannuation fund H adopted by the Direction Générale, and that he would adhere strictly to those regulations as forming an integral part of the conditions of his engagement. It is clear, and is common ground, that the contract of employment was governed by Turkish law, and that his salary (what is described as his basic salary, or his *traitement fixe*) was in Turkish pounds.

He served in different parts of Turkey continuously (except for certain periods in 1916, 1917 and 1918, when he was absent on military service) until about Oct., 1922. He was then, for reasons connected with the War, compelled to leave Smyrna and go to Athens. About the end of Apr., 1923, he was transferred from Athens to Cyprus, where he re-
A mained in the appellants' service until 1931, when he retired, on the terms that he was entitled to a pension, in accordance with the pension regulations, at the rate of 48 per cent. of the fixed salary received by him on Dec. 31, 1930. His basic salary as expressed in Turkish money was Ltq. 30 a month, and his pension was, accordingly, Ltq. 14.40 per month.
B The question in the appeal is how that monthly pension is payable. As already stated, the respondent's contention is that he is entitled to be paid a fluctuating sum of money in currency sufficient to purchase the quantity of gold bullion which would have been represented by these Turkish pounds on a gold basis.

C The pension regulations provide for the right of the employees to a pension on retirement, subject to various conditions not here material, and the appellants bind themselves to maintain a pension fund, to be fed from time to time by contributions from the employees of 4 per cent. of their fixed salary, together with half of any increments they receive
D in any year, and by monthly contributions from the appellants of 6 per cent. of the salaries. In 1925, during the course of the respondent's service, the 4 per cent. was increased to 5 per cent., and the appellants' contribution was increased to 10 per cent. The articles of the regulations which are essentially material in this case are the following: Art. 14,
E which provides that the amount of the pension is fixed on the basis of the salary which the employee received on Dec. 31 of the year preceding that in which he is retired.

> 15. The amount of the pension will be calculated on the following basis: (i) for 10 years' service 30 per cent. of the annual fixed salary. (ii) 2 per cent. for each
> F of the subsequent years. 16. In no case shall the amount of the pension exceed the three-quarters of the annual fixed salary. Nevertheless, neither can the pension be less than Ltq. 45 per annum for an employee, nor than Ltq. 25 per annum for a servant.

This last article shows that the basic salary on which the pension is based is to be expressed in Ltqs., and this is corroborated by art. 22
G which deals with widows' and orphans' pensions, and which states that any such pension cannot be less than Ltq. 25 per annum, or more than Ltq. 300 per annum.

It is not suggested that there is to be found anywhere any contractual condition which could be described as "a gold clause." The respondent's
H claim is based on the fact that, before the War, the currency authorised as legal tender by the Turkish Government was on a gold basis, and the monetary unit was the gold pound, and that, at the date of the contract, the salary was paid to the respondent and to other employees by means of that currency in gold coins, save as to fractional amounts. Assuming these facts, the conclusion is sought to be deduced that, after the War,

and after Turkey, like other countries, went off gold, there was still an original contractual obligation, which existed throughout, to pay in gold. In other words, this contention amounts to introducing into the contract the effect of a gold clause, a clause the nature of which has been discussed in several cases, though in fact no such clause is anywhere expressly to be found in the transactions between the parties. The respondent also sought to corroborate this conclusion by referring to the practice adopted by the bank in paying the salaries of its employees in Turkey, in Cyprus and in other countries after the currency changes consequent on the War had taken place. The respondent contended that what was done in that way showed an intention throughout to pay the equivalent of gold coin. The appellants, on the contrary, relied on these same circumstances as showing that neither in fact nor in intention was the respondent ever paid on the basis of the gold content of the Turkish pound, nor on a gold parity.

Before examining in outline the nature of the different evidence, it will be necessary to advert briefly to the evidence of the Turkish currency law. As has already been stated, before the War, the Turkish currency was on a gold basis, and the gold £1 coins were in circulation as legal tender. In Jan., 1915, the export of gold was prohibited, and a series of Acts was passed in Turkey providing for a paper currency, which should have a compulsory circulation as legal tender alongside of, and as equivalent to, gold. That is to say, the currency note for the Turkish £1 should be legal tender compulsorily alongside of, and in place of, the Turkish monetary unit, which, in a decree of 1880, had been specified to be the gold £ of 100 piastres. These various enactments, each of which provided for the issue of a certain quantity of paper currency notes, were expressed to be temporarily in operation, and provided for the redemption of those paper notes in gold after the War. That has never been doné. In 1925, the existing notes then in circulation were replaced by a single issue of notes by the government. At all material times since the commencement of the War, the paper notes have been legal tender, and, although the gold £ is still legal tender, the paper currency has, in accordance with Gresham's Law, driven out from circulation the gold currency, so that in practice gold has ceased to circulate as legal tender. The Turkish gold coins are now, for all practical purposes, dealt with only as a commodity or bullion. This was very fully explained by the evidence of the experts on Turkish law and on the conditions of Turkish currency called by the appellants. The appellants also called a Turkish lawyer who stated in evidence that, by Turkish law, a contract made, say, in 1912, subject to Turkish law, to employ a man at Ltq. 20 a month would not be construed by that law as a contract to pay him 20 pieces of gold, even though gold was the normal form of the then legal tender, but as a contract to pay him Ltq. 20 in whatever might be legal tender in Turkey, according to Turkish law, at the material time. There was, said this witness, nothing before the War in Turkish law to say that

Ltq. 4 salary was a contract meaning Ltq. 4 gold. This evidence of the eminent Turkish lawyer was not shaken nor contradicted, and no good ground can be adduced for not accepting it. It is in fact in accordance with the English law on this point, which is now well-established, particularly by some recent decisions. In *Adelaide Electric Supply Co., Ltd.* v. *Prudential Assurance Co., Ltd.* (1), a question arose as to the appropriate currency in which a certain debt should be discharged. The question there was not identical in form with the question here to be decided, but the House of Lords laid down certain principles which are of general application, and are to be applied to the questions in this case. In particular, reference may be made to a statement by LORD RUSSELL OF KILLOWEN, expressing the difference between what is called a unit of account and the legal tender which corresponds to the unit of account. In the *Adelaide* case (1) the question was what was the currency in which the debt was payable, whether English or Australian. LORD RUSSELL OF KILLOWEN said, at p. 148 :

> The question then is, how can the company discharge that indebtedness ? The answer can I think only be, in whatever currency is legal tender in the place in which the indebtedness is dischargeable. It is not a question what amount of coins or other currency has the debtor contracted to pay. A debt is not incurred in terms of currency, but in terms of units of account.

The same view was expressed by this Board in a similar case, *Auckland City Council* v. *Alliance Assurance Co., Ltd.* (2), where it is stated, at p. 605 :

> Contracts are expressed in terms of the unit of account, but the unit of account is only a denomination connoting the appropriate currency.

The unit of account must, accordingly, be applied to the appropriate currency, which may vary from time to time. In the *Adelaide* case (1), LORD WRIGHT in his opinion, at p. 160, quoted as a correct statement of the law what was said by MAUGHAM, J., in *Broken Hill Proprietary Co., Ltd.* v. *Latham* (3), at p. 391 :

> A contract to pay so many pounds, whether a British or Australian contract, was not in 1920, and still less is now, a contract to pay in gold, but is *prima facie* a contract to pay money according to the currency of the country where payment has to be made.

These words are equally true of a case like the present, where the question does not turn on a conflict between the currency of one country and that of another, the unit of account being identical in both, but where there has been a change in the currency of the country concerned. That type of case was dealt with in *Re Chesterman's Trusts, Mott* v. *Browning* (4), where a mortgage debt in German reichsmarks, contracted while Germany was on gold, was held by RUSSELL, J., and by the Court of Appeal to be dischargeable in depreciated German reichsmarks, without reference to what country was the place of payment. LORD STERNDALE said, at p. 478 :

> if their [i.e. the mortgagees'] rights are to be defined by German law it must be that law as it exists from time to time.

The effect of the respondent's contention, if acceded to, would be to construe a contract which did not contain a gold clause exactly as if there were a gold clause expressed in it. The nature of a gold clause is now well-established; it has been fully discussed in the decision of the House of Lords in *Feist* v. *Société Intercommunale Belge d'Électricité* (5), and more recently in *R.* v. *International Trustee for the Protection of Bondholders Akt.* (6), where it is pointed out by the Court of Appeal that gold clauses in bonds and obligations are very common in international contracts in every part of the world, and that the construction of such clauses has now been definitely settled. It would indeed be a paradoxical result if it were now to be held that the gold clause is unnecessary, because it is to be implied in every contract which was made at a time when the country was on gold, and when payments were normally made on a gold basis. The gold clause was specifically designed to safeguard the rights of the creditor against the risk of the currency's being changed and depreciated. A B C

So far this way of regarding the matter would appear to be conclusive against the respondent's contention, and to dispose of the appeal in favour of the appellants. It is, however, necessary to examine with some care the practice of the appellants in paying their employees, and in particular the course which they adopted in Turkey, in paying the respondent and other employees, after the Turkish currency went off gold. Reliance is placed by the respondent on these facts as being, in a phrase which was used, exegetical of the contract, and something like the principle of contemporaneous exposition was invoked. It is obvious that, if a contract is clear and unambiguous, its true effect cannot be changed merely by the course of conduct adopted by the parties in acting under it. Such conduct, if it is clear and unambiguous, may, in certain events, raise the inference that the parties have agreed to modify their contract, but, short of that, such conduct cannot have the effect of changing the operation of an unambiguous agreement, though it might possibly, in special cases, support, along with other appropriate evidence, a claim for rectification. But the practice which is relied on here is not contemporaneous with the contract, and, at the best, is ambiguous, whereas the contract is clear. In addition, the practice seems to be only consistent, when properly understood, with the construction of the contract which their Lordships have just enunciated. The change in the Turkish currency became effective early in 1915, but for some time did not appear to affect the actual relations of the parties in regard to the payment of salary. The respondent continued to serve in Turkey until 1923, subject to his military service and the short period which he spent at Athens. It will be convenient first to deal with what was done in Turkey in the payment of salaries to employees, including the respondent, in that country. Up to about May, 1916, the appellants, notwithstanding the change in the currency law, elected to pay the fixed salaries to their employees in Turkey in gold at its face value. D E F G H

From then, save for a few months in which half the salaries were paid in gold and the other half in currency notes, until Dec., 1919, they paid the fixed salaries in currency notes at their face value, but they made certain additional payments, for practical reasons. By the latter part of 1916, the currency had seriously depreciated and the cost of living had enormously increased. It was accordingly necessary for the appellants to take some remedial measures to help their employees in Turkey, who, if paid in the depreciated currency the amount of their fixed salary and nothing more, would have been unable to live. The appellants were naturally anxious not to change the fixed salaries, because they thought that the unfortunate conditions would be temporary, and they sought to meet the conditions by paying, in addition to the fixed salary, certain additional emoluments, which were variously called allowances, indemnities or gratifications. The fixed salary, however, was treated as constant, and the contributions to the pension fund continued to be based on the fixed salary. The amount of these additional allowances varied from time to time, and varied between one class of employee and another. They had no definite relation to the disproportion between gold and currency, nor had they the effect of paying to the employees sums in currency equivalent to what has been called the gold value of the fixed salary. It is unnecessary here to detail the elaborate calculations which the appellants adduced in order to prove this fact.

At the beginning of 1920, it was sought by the appellants to put the whole position on a more constant basis, and the scheme was adopted, at first only for one year, that the employees in Turkey should be paid on the following basis: the basic salary in the Turkish currency was multiplied by a co-efficient 110-100, and the product obtained, regarded as a notional sum in pounds sterling, was reconverted into Turkish currency at the average of the rates of exchange which had prevailed in the market during the previous three months between the pound sterling and Turkish currency. The sum in Turkish currency arrived at by these two arithmetical operations was, with, in most cases, allowances, the sum paid to the employee. The rate of exchange for the previous three months was, in the first instance, taken as Ltq. 3.63 to the £ sterling. This was an average rate, and was further removed from accuracy by the time lag. That method was, after a few months, varied, by substituting a conventional figure of 4.51 as a rate of exchange, and, after a while, the system became established to multiply the fixed salary by a fixed co-efficient of 4.1 as representing $\frac{451}{110}$. This method was adopted with the same object of maintaining unaltered the fixed salary but increasing the payment in order to meet the increased expense of living, and it was sought to establish that position on a constant basis so long as circumstances might require. It is impossible to treat such a method as giving to the employees, in fact or in intention, the equivalent of gold. There are many reasons, apart from the obvious purpose of the scheme as already stated. It is clear, in the first place, that at no period between 1920 and 1923 was sterling on a gold basis. For instance, in 1920, when the scheme was first introduced in its original form, England was off the gold standard, and sterling had depreciated in terms of gold to an extent of 20 per cent. to 25 per cent. Sterling did not again go on to gold until late in 1925. Further, the rate which was adopted, and which eventually became standardised at 451 piastres to the £ sterling, was much lower than the current market rates, which rose above 600 and eventually to a figure more than 800. Calculations have been adduced for the years 1921, 1922 and 1923 showing the disproportion between the actual salary payments made under this scheme and what would have been the value in terms of fine gold of the fixed salary. Even if the additional allowances which were regularly made, in addition to the payments on account of the fixed salary, arrived at according to this system, are taken into account, the total sums so paid to the employee are, in general, less, and sometimes much less, than what would have been the value of the gold content of the Turkish pound of fixed salary. It is enough here to state this conclusion, without further discussing the detailed evidence.

The position so far is that no question of a change of practice arose until some years after the respondent's employment began, and because of the special conditions which supervened, and the practice which was adopted up to the time when the respondent went to Athens does not in fact support the view that he was being paid his salary according to its gold equivalent. During the few months in which he was in Athens, he was paid in drachmas on a conventional rate of exchange. When he went to Cyprus, it was on the terms of a letter from the general management, dated Mar. 31, 1923, in which he was instructed to proceed to serve in Cyprus at the same salary of Ltq. 30 per month :

> which will be paid to you on the basis of the system customary in that island [*qui vous sera réglé en base du régime usité dans cette ile*].

The respondent proceeded accordingly. The *régime usité* thus referred to was a practice which had long been adopted by the appellants in paying their employees in Cyprus. The practice was analogous to that which they had adopted in paying employees in other countries, such as Greece or Egypt, in which there was a currency different from the Turkish. The amount of the fixed salary was converted into Cyprus currency at a fixed coefficient 110 to 100. That practice, which prevailed before the War, was continued by the appellants after the War, notwithstanding the depreciation of the Turkish currency. It had the effect of making up to some extent the depreciation of the Turkish currency. It did not, however, put the payment of the Turkish salary, when converted into Cyprus currency, on a gold basis. In the first place, sterling itself, as has already been pointed out, was not equivalent to gold. Again, the conventional coefficient 110 to 100 did not represent the true pre-War rate of exchange, which varied between 109 and $111\frac{1}{2}$, nor did it represent the true ratio between the two gold coins, which was 110.69 to 100.

It is impossible, in their Lordships' judgment, to treat this method of paying salary as showing that the original contract was a contract to pay in gold coins. The ratio 110-100 had been adopted by the bank for purposes of internal book-keeping, and had been adopted, even before the War, in paying its employees in Cyprus as a convenient and sufficiently accurate method, and, as such, was continued, for the reasons which have been stated, but not with any intention or effect of paying on a gold basis. The respondent's contribution to the pension fund, which in Turkey had been paid on the converted figure of the fixed salary when that system was adopted, was in Cyprus paid on the actual salary payments in Cyprus currency, and was no more on a gold basis than was the salary itself. The respondent further contended that while he was in Cyprus, and in particular on the date of Dec. 30, 1930, which was the date to be taken under the regulations for ascertaining his basic salary, what he was receiving was the equivalent of gold, because, he said, in Cyprus, during the years he was there, the Cyprus currency notes, which were equivalent to the sterling currency, were in fact interchangeable with gold. Indeed, he said that occasionally he did actually get gold sovereigns from the bank. Their Lordships find that there is no justification for this view. The evidence is quite clear that the sovereign in Cyprus, as in England, was not used as currency. The records of the bank show very few instances, negligible in amount, of sovereigns being paid or received. Hence this point may be disregarded. The precise effect of the letter of instructions, coupled with the respondent's action taken on that letter, has not been precisely elucidated in argument. It is not contested by the appellants that in respect of the Cyprus service they are bound to pay, and they are certainly willing to pay, the respondent, in regard to his pension, on the salary as based on the terms of that letter. It may be that there was in law a new and revised arrangement fixing the salary payable to him while in Cyprus on that particular basis. That, however, would not give the respondent any right to claim that his salary was on a gold basis. His rights would be to receive the fixed salary in Turkish currency converted by the artificial system which was adopted. This is what the appellants concede, but it would not, on any view, carry with it a right to be paid such an amount of Cyprus currency as would represent the gold value of Ltq. 14.40. Nor would any different result follow if the true view were that this arrangement was simply giving effect to the original bargain between the parties, which, on this view, included the implied term that the *régime usité* was to apply if the respondent was ordered to go to Cyprus. It would seem that, so far as salary was concerned, the *régime usité* came into operation so long only as the respondent was actually serving in Cyprus. It is not here necessary to determine what would happen as regards the pension if the respondent, while enjoying the pension, ceased to reside in Cyprus. At present he appears to have a permanent position there. It may be that the true view is that his pension, once having been ascertained in the way in which it has been ascertained, would remain unaltered even though he were to leave Cyprus.

Their Lordships have not thought it necessary to refer specifically to the entries in the salary book, which seem to them to accord with the view of the position just stated. It is, however, necessary to refer to two further arguments which were put forward by Sir William Jowitt for the respondent. The first may be thus stated—" Taking the salary at the material date on which the pension is to be based at Ltq. 30, and taking the conventional coefficient of 110 to 100, and bearing in mind that Cyprus was on gold parity at the material date, the true inference, it is contended, is that the bank thereby designed to pay in Turkish gold, because the ratio had no meaning as applied to Turkish paper. In fact, at that time, the exchange of Turkish paper as against sterling was 900 or more." This argument, in their Lordships' judgment, entirely overlooks the whole history of the case, and the method of evaluation according to which the actual payments were arrived at. In addition, it was, in the strict sense, merely accidental that the English £ was on gold in Dec., 1930. In the course of 1931, as is well known, the £ went off gold, and the sterling £ depreciated so that the sovereign was worth more than 30*s*. sterling. This again shows that the coefficient of conversion had no relation to gold.

A further point put forward by Sir William Jowitt was based upon the construction of the Turkish statute which authorised the issue of currency notes and made them legal tender. These statutes were in terms limited to Turkish currency in Turkey. Sir William has contended that, outside Turkey, pre-War currency law remained in effect, so that the legal tender outside Turkey remained the Turkish gold pound. Their Lordships are unable to accept this contention. The currency in any particular country must be determined by the law of that country, and that law is naturally in terms limited to defining what is legal tender in that country. But, when that is fixed by the local law, it determines what is the legal tender of that country for purposes of transactions in any other country, so that a foreign court will, when such questions come before it, give effect to the proper law of legal tender so determined. There is no foundation, in their Lordships' judgment, for the argument that Turkish paper is only legal tender as equivalent to gold *sub modo*, that is, within the territorial limits of Turkish jurisdiction.

For these reasons, their Lordships are of opinion that the appeal should be allowed.

It is, however, necessary to refer to two recent judgments of this Board which appear to conflict with each other, and one of which is, in the result, in conflict with the present decision. It will be convenient first to deal with the latter of these two cases, *Ottoman Bank of Nicosia* v. *Dascalopoulos* (7). The bank's employee, the plaintiff in that case, was serving in Cyprus when he became entitled to his pension in the latter part of 1932. It was held by this Board that he was entitled to succeed on his claim that the pension was payable in Turkish gold £ translated into Cyprus currency at the exchange rate of the day. The basis of their Lordships' decision was that the reference in the pension regulations to the Ltq. was a reference to Turkish gold £, on the ground, it seems, that the only Turkish gold £ in circulation was a gold coin of A a special gold content. If this view of the true construction of the regulations could be regarded as a mere question of law, their Lordships might hesitate before differing from a previous decision of the Board, though in this particular case it has to be observed that the Board in that decision were, in truth, themselves differing from an earlier decision of B the Board, as will be explained later. But the construction of the pension regulations depends on Turkish law, which in the Cyprus Court is a question of fact, and the Board in *Dascalopoulos's* case (7) had no evidence before them on Turkish law. They did not have the evidence which the courts had before them in this case, and which their Lordships now have C before them, that, according to Turkish law, the pension regulations did not constitute a contract to pay in gold. This vital circumstance is enough to entitle, and indeed to compel, their Lordships now to consider the case before them independently of the *Dascalopoulos* decision (7). There are several other matters which also impose this duty upon the D Board; for instance, the evidence as to the Turkish currency law which has been given in the present case was not given in the previous case; the fact which the Board accepted as established before them—namely, that in Cyprus in 1930 the Cyprus £ note and the sovereign were in practice interchangeable—was negatived by the evidence in the present E case. There are also various other matters of fact and evidence, not here necessary to enumerate in detail, which compel this Board to examine the question of construction afresh, in the light of the circumstances proved before them and material to be considered in deciding what is the true construction of the contract and also in understanding the F practice adopted under the contract. These matters were not before the Board in the *Dascalopoulos* case (7). It is thus not possible for the Board to hold, as was done in the *Dascalopoulos* case (7), that the equivalent in Cyprus currency, as obtained by the formula of the *régime usité*, was, or was intended to be, a real equivalent of gold, nor that it was G merely exegetical of a basic contract which was a gold contract.

It is necessary to consider one other case which recently came before this Board, *Ottoman Bank* v. *Chakarian* (8). In that case Chakarian, who had been an employee of the defendant bank, sued in the Cyprus court, claiming that he was entitled to damages for wrongful dismissal H from the bank's service. At the date of his dismissal, he had been serving in Turkey. It was held by the courts below and by this Board that his claim was justified, and that he was entitled to damages. The question arose as to the correct amount of damages to be awarded to him on the footing that he was serving in Turkey at the material date. His salary had been paid according to the system in vogue in Turkey, the nature of which has been explained above. The effect of that system was to give a monthly salary expressed in terms of Turkish currency, arrived at by converting into Turkish currency the sterling figure into which the basic salary had been converted by the conventional coefficient, presumably with due regard also to any extra allowances. The Board agreed with the majority of the judges of the Supreme Court that this was the basis on which the pension to which Chakarian would have been entitled was to calculated. There was no suggestion that the figures were to be taken as on a gold basis. The only point at issue was whether the rate of conversion of the figure of Turkish currency for the purpose of a decree in sterling was the rate current at the time of dismissal or that current at the date of the decree. The rate for the former date, which was accepted as a true date, was taken by agreement at 720 piastres to the pound. If this method was correct, as the courts held that it was, it is evident that the matter was not dealt with as on the footing of a parity with gold. In the *Dascalopoulos* case (7), the Board did not, as their Lordships think, appreciate the effect of that decision, which the Board regarded as showing that the salary was assumed to be, even in Turkey, a salary in Turkish gold pounds. Their Lordships have now had the advantage of the elaborate evidence on the Turkish currency law, and are unable to accept that view. They agree with the decision of 1930, which is consistent with the decision at which they now arrive in the present case, and is not consistent with the decision in the *Dascalopoulos* case (7).

In coming to the conclusion that the appeal should be allowed, the Board have had to consider what order should be made in their judgment on the question of costs. If the respondent were ordered to pay the costs, as would be done in the ordinary course, it would amount in effect to depriving him of his pension for the future, and indeed, in all probability, to impounding a much more serious liability. The appellants, however, through Mr. Pritt, have shown that they have appreciated what hardship to the respondent would be thus involved, and have stated that they are willing to leave the question of costs to the untrammelled discretion of this Board. Their Lordships feel that this case should be treated as one of very exceptional character, particularly because of the great conflict of judicial opinion, and of the importance of having a decision which may govern in future many other cases under the pension regulations. As the appellants have very fairly and generously left the matter to them, they feel justified in taking the view that no order should be made as to costs, either here or below.

Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed, the judgments of both courts in Cyprus set aside, and the action dismissed.

Solicitors: *Bischoff, Coxe, Bischoff & Thompson* (for the appellant bank); *Gisborne & Co.* (for the respondent).

[*Reported by* T. A. Dillon, Esq., *Barrister-at-Law.*]

EATON *v.* GEORGE WIMPEY & CO., LTD.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Romer and MacKinnon, L.JJ.), **November 3, 4, 29, 1937.**]

Workmen's Compensation—Industrial disease—Incomplete recovery from disease contracted more than 12 *months before date of disablement—Liability of employers within the* 12 *months—Employment to the nature of which the disease was due—Workmen's Compensation Act,* 1925 (*c.* 84), *s.* 43.

In 1933, while employed by S., a workman contracted dermatitis. In 1935 he compounded his claim against S. In May, 1936, he entered the employment of the appellants and on July 24, 1936, he was certified as suffering from dermatitis, and as being disabled from July 15, 1936. The arbitrator found that, in consequence of the attack in 1933, the workman was more susceptible to the disease than he had been before, and that he had not therefore completely recovered from the attack in 1933. He made an award in favour of the workman. It was contended that he was wrong in law in finding that the disease in 1936 was contracted while in the employ of the defendants :—

HELD : the appellants were the employers who last employed the workman during the 12 months before July 15, 1936, in the employment to the nature of which the disease was due within the Workmen's Compensation Act, 1925, s. 43 (1) (*c*), and the award against them was properly made.

[**EDITORIAL NOTE.** In the case of a disease like dermatitis, the workman has not to prove that it was contracted in the course of his then employment. It is sufficient that he was employed within 12 months of the date of disablement in an employment to the nature of which the disease is due. The last employers can shift the burden on to other employers within the twelve months, but not on to employers who ceased to employ the workman before that time. The certifying surgeons having certified that disablement commenced in 1936, the employers were bound by that decision, and could not treat the disease of 1933 as the notional accident.

AS TO INDUSTRIAL DISEASES, see HALSBURY, 1st Edn., Vol. 20, Master and Servant, pp. 166, 167, para. 350 ; and FOR CASES, see DIGEST, Vol. 34, pp. 469-471, Nos. 3838-3846. See also WILLIS'S WORKMEN'S COMPENSATION, 30th Edn., pp. 527-532.]

Cases referred to :

(1) *Blatchford* v. *Staddon & Founds* (1927), 43 T.L.R. 424 ; 34 Digest 465, *3810* ; 20 B.W.C.C. 391.

(2) *Wilsons & Clyde Coal Co., Ltd.* v. *Flynn*, [1930] A.C. 516 ; Digest Supp. ; 99 L.J.P.C. 139 ; 143 L.T. 362 ; 23 B.W.C.C. 159.

(3) *Timmins* v. *Brodsworth Main Colliery Co., Ltd.*, [1934] 2 K.B. 361 ; Digest Supp. ; 103 L.J.K.B. 707 ; 151 L.T. 231 ; 27 B.W.C.C. 283.

(4) *Durrant* v. *British Fibro-cement Works, Ltd.* (1935), 104 L.J.K.B. 222 ; Digest Supp. ; 152 L.T. 205 ; 27 B.W.C.C. 460.

(5) *Richards* v. *Goskar*, [1936] 3 All E.R. 839 ; Digest Supp. ; 29 B.W.C.C. 357.

(6) *McNicholas* v. *West Leigh Colliery Co., Ltd.* (1933), 26 B.W.C.C. 29 ; Digest Supp.

APPEAL by the respondents from an award of His Honour JUDGE BEAZLEY given at Edmonton County Court and dated May 21, 1937.

J. Alun Pugh and *H. Everett* for the appellants.

F. A. Sellers, K.C., and *S. Lincoln* for the respondent.

MacKinnon, L.J. [delivering the judgment of the court]: The respondent entered the employment of the appellants on May 28, 1936. His work was concerned with laying a sewer in wet ground, and he had to handle dry cement when making joints in the pipes. On July 24, 1936, a certifying surgeon, pursuant to the Workmen's Compensation Act, 1925, s. 43, gave a certificate that the respondent was suffering from dermatitis produced by dust or liquids, and was thereby disabled since July 15, 1936, from earning full wages at the work at which he had been employed—namely, pipe-laying and jointing. The appellants appealed from this certificate to the medical referee. The referee, on Aug. 11, 1936, signed his certificate:

> He is suffering from dermatitis produced by dust or liquids, and he is thereby disabled from earning full wages at the work at which he was employed. He is not fit for any form of work.

The respondent claimed compensation, which was resisted by the appellants. The arbitration accordingly took place on May 13, 1937, before His Honour Judge Beazley, sitting with a medical assessor. The appellants proved, or elicited by cross-examination, that in 1933 the respondent was employed by Messrs. Smith Bros. While so employed, he was certified to be suffering from dermatitis from dust or liquids, and was paid compensation. It appears from the evidence that his dermatitis so certified was connected with the use of cement in his work for Messrs. Smith. In June, 1935, he compounded any further claim against Messrs. Smith for the sum of £260. The respondent's panel doctor, who gave evidence for him, said that after the attack in 1933 the respondent would be more prone to a further attack upon exposure to cement, and agreed that his attack in July, 1936, was probably a recurrence of the 1933 attack. A doctor called for the appellants agreed with this. The medical assessor advised the arbitrator that, in his opinion, the respondent had never completely recovered from the 1933 attack, and had still got it. In his judgment, the county court judge said:

> I am satisfied by all the medical evidence, including the opinion of the medical assessor . . . that in consequence of the attacks of dermatitis in 1933-1935 the applicant was more susceptible to the disease than he had been before, and that he had therefore not completely recovered from the attack in 1933.

The arbitrator made an award in favour of the workman on the basis of his total unfitness for work. The material grounds of the employers' appeal are (i) that the judge was wrong in law in finding that the disease from which the man was found to be suffering in 1936 was contracted while in the employment of the appellants, and (ii) that he ought to have given effect to the evidence, which he accepted, that the disease was in fact contracted when the man was in the employment of Messrs. Smith, in 1933.

Sect. 43 of the Act provides that compensation shall be recoverable if a surgeon certifies that the workman is suffering from an industrial disease and that disease:

> is due to the nature of any employment in which the workman was employed [within 12 months of the disablement.]

It is essential to observe that the words are " due to the nature of " the employment, and that they are not " caused by the employment," nor " contracted during the employment." The section does not require that the disease should in fact have been caused by the particular employment within 12 months, nor does it require the workman to prove that it was so caused. Sect. 44 (1) is to the same effect. This subsection in fact does not apply to this case, since in Sched. III " dermatitis produced by dust or liquids " appears in the first column without any process set against it in the second column, but the wording illustrates the scheme of the legislation. If, for example, a man is certified as suffering from " arsenic poisoning or its *sequelæ*," and if within 12 months he has been employed in a process involving " handling of arsenic, &c.," the disease " shall be deemed to have been due to the nature of that employment, unless the employer proves," not " that the disease was not contracted while in his employment," but " that the disease was not contracted from the handling of arsenic, &c.," for example, by proving that the man had accidentally drunk some liquor containing arsenic. If he cannot prove that, and if the disease was contracted from such a process, that is, was due to the nature of the employment, the condition entitling the man to any compensation is fulfilled, whether the disease was contracted in the course of his then employment or some other. This result seems also clearly indicated by sect. 43 (*c*) and its provisoes (ii) and (iii). Clearly the appellants under (*c*) are :

> the employer who last employed the workman during the 12 months [before July 15, 1936] in the employment to the nature of which the disease was due.

If within those twelve months he had been in the employment of Messrs. Smith, it would have been open to the appellants to prove that the disease was in fact contracted while he was in the employment of Messrs. Smith, and the appellants, under proviso (ii), having joined Messrs. Smith Bros. as parties to the arbitration, could have shifted on to them the burden of paying the compensation. Similarly, if the disease were of a nature to be contracted by a gradual process, they might have claimed contribution from Messrs. Smith Bros. under proviso (iii).

The appellants here sought to prove, and in fact succeeded in proving, that the man contracted the disease when in the employment of Messrs. Smith Bros. But the relevance, if not the admissibility, of such evidence could arise only if they were seeking to take advantage of either proviso (ii) or proviso (iii). The man's employment with Messrs. Smith Bros. having ceased more than 12 months before July 15, 1936, proviso (ii) could not apply, and Messrs. Smith Bros. could not be joined as parties ; and, if the proviso does not apply, the enactment of clause (*c*) is conclusive—the compensation is " recoverable from " the appellants as :

> the employers who last employed the workman during the said 12 months [before July 15, 1936] in the employment to the nature of which the disease was due.

In the last paragraph we have said : " If within the last 12 months he had been in the employment of Messrs. Smith Bros.", the appellants could have availed themselves of proviso (ii). That the words " within the said 12 months " must be read as qualifying the words " was in the employment of some other employer " in proviso (ii) seems to have been decided by the House of Lords in *Blatchford* v. *Staddon & Founds* (1). Viscount Sumner, referring to the provisoes, says, at p. 399 :

> Provisoes are finally added to mitigate the hardship of exacting compensation from an employer, whose employment may not be shown to have had and may not actually have had anything to do with the onset or the progress of the disease or with the ultimate disablement of the workman. He is to have the opportunity of recovering over part or even the whole of the compensation from others, whose employment of the workman during the 12 months in question in processes, from the nature of which such a disease arises, may have been its source in fact.

Lord Wrenbury says, at p. 410 :

> Must this other employer have been an employer during the statutory 12 months ? It seems to me that he must, for otherwise no liability has by anything which precedes been created in him.

That this is the correct view, if reason be required other than the fact that the House of Lords has said it is, may surely be derived from the words in para. (i) of the provisoes, requiring the workman to supply the names of other employers " during the said 12 months," and from the express reference to " other employers who during the said 12 months ", etc., in para. (iii) of the provisoes.

It is quite true that this result may appear to work hardship on the appellants or their insurers. They have proved that the disease was contracted when the man was employed by Messrs. Smith Bros. If that employment had been within 12 months, they could have handed on the burden of compensation to Messrs. Smith Bros. under the proviso ; but, as the employment under Messrs. Smith Bros. was more than 12 months before, and as the disease contracted in that employment was therefore of long standing, possibly of a chronic character, the appellants cannot shift the burden, and must bear it themselves. We can only suppose that the legislature considered that prudent employers could be sufficiently protected against any such hardship by having recourse to the procedure provided under sect. 43 (*b*).

There is another way in which, if the Act allowed it, the appellants might seek to rely upon the evidence as to what happened to the respondent when in the employ of Messrs. Smith Bros., and its continuing effect. They might seek to say, " The notional accident did not happen to this man on July 15, 1936, for in fact, as we can prove, he was disabled years ago when in the employment of Messrs. Smith Bros." But the Act does not permit such an intention, for, by sect. 43 (2) :

> the date of disablement shall be such date as the certifying surgeon certifies as the date on which the disablement commenced [in this case, July 15, 1936].

By sect. 43 (1) (*a*) " the disablement shall be treated as the happening of the accident." Upon this aspect of the case, as well as on the matters we have previously considered, the decision of the House of Lords in *Wilsons & Clyde Coal Co., Ltd.* v. *Flynn* (2) is directly in point, and is, of course, conclusively binding upon us. As Viscount Hailsham said in that case, at p. 167:

> The language of the statute is quite plain and unequivocal, and in my judgment it is our manifest duty to give to the words used their plain meaning.

A Another case, which is very much in point, and supports the same conclusion, is the decision of the House of Lords in *Blatchford* v. *Staddon & Founds* (1). The House was there concerned to construe sect. 8 of the Act of 1906, but its words have been re-enacted in sect. 43 of the Act of 1925. Viscount Sumner says, at p. 401:

> B In construing the Act effect must be given to the words " to the nature of." Their meaning cannot be the same as if the section had simply said " is due to " any employment. I think they are inserted because this part of the section is not concerned directly with something arising out of the particular service of the particular employer sued, but with results, which are incidental to the class of employment in which the workman has served several employers.

C Counsel for the appellants cited to us a number of cases which appear to have only an indirect bearing, if any, upon the problem involved in this case. Two of them, indeed, *Timmins* v. *Brodsworth Main Colliery Co., Ltd.* (3) and *Durrant* v. *British Fibro-cement Works, Ltd.* (4), have been held by the House of Lords, in *Richards* v. *Goskar* (5), to have been incorrectly decided. They also relied upon the decision in the House D of Lords in *Richards* v. *Goskar* (5). It appears to us to have little relevance to this case. There a workman was certified to be suffering from an industrial disease in 1932, and was paid compensation till he resumed work in 1933, and was paid full wages till the colliery closed later in 1933. He then claimed to have his compensation again, and it was E found as a fact that he still suffered from the disease certified in 1932. The House of Lords held that he was entitled to recover. Lord Atkin, at p. 375, cites with approval the words of Romer, L.J., in *McNicholas* v. *West Leigh Colliery Co., Ltd.* (6), at p. 44:

> F It is . . . the disease that he is entitled to treat as the injury, and not the disablement, from which it follows that he does not cease to be entitled to treat himself as having sustained injury by accident merely because his disablement ceases temporarily.

That case might have some bearing on the present case if the workman Wimpey had not compromised his claim for compensation against G Messrs. Smith Bros., and if, on proof that in 1936 he was still suffering from the dermatitis certified in 1933, he had claimed further compensation from them. But we cannot see that the case has any bearing on the question whether, on the facts of this case, he can claim compensation from the appellants. It does not seem profitable further to discuss the H authorities cited for the appellants. The case of *Wilsons & Clyde Coal Co., Ltd.* v. *Flynn* (2) is a decision of the House of Lords that is directly in point, and the principle of a second decision of the House of Lords in *Blatchford* v. *Staddon & Founds* (1) is also as conclusive. It is not profitable to consider other cases which may be said, indirectly, not to be wholly consistent with those cases. In them the House has spoken quite clearly, and we are bound by their decisions. It is needless to add that we entirely agree with them. This appeal, therefore, must be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *James Turner & Son* (for the appellants); *Durnford, Son & Bartle* (for the respondent).

[*Reported by* Reginald Townsend, Esq., *Barrister-at-Law.*]

ATTORNEY-GENERAL (AT THE RELATION OF ORMEROD TAYLOR & SON, LTD.) AND ORMEROD TAYLOR & SON, LTD. *v.* TODMORDEN BOROUGH COUNCIL.

[King's Bench Division (Goddard, J.), **November 17, 18, 1937.**]

Highways—Road supported by retaining-wall—Main road—Wall old but still capable of supporting highway—Non-feasance—Raising level of road—Misfeasance—Amount of repair necessary—Whether altered by Local Government Act, 1929 (*c.* 17), *s.* 29.

A highway, vested in the defendant corporation and situated on an incline, was supported by a retaining-wall, which was extended upwards above the road to the height of about 2 ft. 6 ins. as a fence-wall. The whole wall was a dry wall, the stones not being cemented together. The plaintiffs were the owners of property immediately adjoining the retaining-wall, and wished to erect new buildings on their land. There was evidence that there had been some minor collapses of parts of the wall in recent years. In the course of adapting the road to modern traffic conditions, the defendants had raised the level of its surface, and it was contended that such raising had increased the pressure on the wall, and that, the wall not having been strengthened, this was an act of misfeasance. A declaration was asked that this wall was a public or private nuisance, and that the defendants be ordered to abate such nuisance:—

Held: (i) the wall was not a public or private nuisance, as there was no indication that it was in a dangerous condition.

(ii) the position that a highway authority is not liable for non-feasance has not been altered as to main roads by the Local Government Act, 1929.

(iii) the only duty of the highway authority was to keep the wall in a state of repair sufficient to support the highway, and there was no duty upon it to reconstruct the wall in accordance with the best modern engineering practice.

(iv) the raising of the level of the road was not, in the circumstances, an act of misfeasance, as it was not proved to have weakened the wall in any way.

(v) the raising of the level of the road was not an act of misfeasance, although the fence-wall had thereby been reduced in height.

[**EDITORIAL NOTE.** In this case the plaintiffs were anxious to secure the removal of an old retaining-wall supporting a highway before extending their factory on land immediately beneath it. It would no doubt be a rash proceeding to build valuable works beneath this old retaining-wall of imperfect construction, but, as the law stands, and it is fully explored in the judgment herein, the building-owner cannot insist upon the highway authority putting the wall into a state of perfection having regard to modern engineering practice. If he desires this to be done, he must make some special agreement with the authority, and, presumably, bear some part of the cost.

As to the amount of Repair Necessary in the Case of Highways, see HALSBURY, Hailsham Edn., Vol. 16, pp. 298, 299, paras. 374, 375; and for Cases, see DIGEST, Vol. 26, pp. 352, 353, Nos. 785-795.]

Cases referred to:

(1) *R.* v. *Llandilo Roads Comrs.* (1788), 2 Term Rep. 232; 26 Digest 389, *1167*.

(2) *Maguire* v. *Liverpool Corpn.*, [1905] 1 K.B. 767; 26 Digest 400, *1255*; 74 L.J.K.B. 369; 92 L.T. 374.

(3) *Sandgate Urban District Council* v. *Kent County Council* (1898), 79 L.T. 425; 26 Digest 265, *65*.

(4) *A.-G.* v. *Staffordshire County Council*, [1905] 1 Ch. 336; 26 Digest 353, *797*; 74 L.J. Ch. 153; 92 L.T. 288.

(5) *Whyler* v. *Bingham Rural Council*, [1901] 1 K.B. 45; 26 Digest 389, *1168*; 70 L.J.Q.B. 207; 83 L.T. 652.

(6) *R.* v. *Lordsmere (Inhabitants)* (1886), 54 L.T. 766; 26 Digest 364, *892*.

(7) *Reigate Corpn.* v. *Surrey County Council*, [1928] Ch. 359; Digest Supp.; 97 L.J. Ch. 168; 138 L.T. 691.

(8) *Butt (Henry) & Co.* v. *Weston-super-Mare Urban District Council*, [1922] 1 A.C. 340; 26 Digest 462, *1772*; 91 L.J. Ch. 305; 127 L.T. 34.

(9) *Sharpness New Docks & Gloucester & Birmingham Navigation Co.* v. *A.-G.*, [1915] A.C. 654; 26 Digest 581, *2716*; 84 L.J.K.B. 907; 112 L.T. 826; *revsg.* S.C., [1914] 3 K.B. 1.

(10) *Nicholson* v. *Southern Ry. Co. & Sutton & Cheam Urban District Council*, [1935] 1 K.B. 558; Digest Supp.; 104 L.J.K.B. 265; 152 L.T. 349.

(11) *Baron* v. *Portslade Urban Council*, [1900] 2 Q.B. 588; 41 Digest 25, *192*; 69 L.J.Q.B. 899; 83 L.T. 363.

(12) *A.-G.* v. *Shrewsbury (Kingsland) Bridge Co.* (1882), 21 Ch.D. 752; 26 Digest 451, *1668*; 51 L.J. Ch. 746; 46 L.T. 687.

(13) *R.* v. *Thomas* (1857), 7 E. & B. 399; 26 Digest 361, *871*; 28 L.T.O.S. 303.

(14) *Burgess* v. *Northwich Local Board* (1880), 6 Q.B.D. 264; 26 Digest 335, *661*; 50 L.J.Q.B. 219; 44 L.T. 154.

(15) *R.* v. *Oxford & Witney Turnpike Roads Trustees* (1840), 12 Ad. & El. 427; 26 Digest 375, *1006*.

(16) *Morgan* v. *Leach* (1842), 10 M. & W. 558; 26 Digest 458, *1749*; 12 L.J.M.C. 4.

(17) *Gibraltar Sanitary Comrs.* v. *Orfila* (1890), 15 App. Cas. 400; 38 Digest 16, *86*; 59 L.J.P.C. 95; 63 L.T. 58.

(18) *Cowley* v. *Newmarket Local Board*, [1892] A.C. 345; 26 Digest 400, *1251*; 62 L.J.Q.B. 65; 67 L.T. 486.

(19) *Sydney Municipal Council* v. *Bourke*, [1895] A.C. 433; 26 Digest 400, *1254*; 64 L.J.P.C. 140; 72 L.T. 605.

Action by owners of land and buildings adjoining a road, which was vested in the defendant corporation, claiming (i) a declaration that the defendants were liable to maintain and repair the retaining-wall and the fence-wall, (ii) a declaration that the said walls were in such a state as to be a public nuisance, and (iii) an order that the defendants forthwith abate the nuisance. The defendants, after denying the want of repair and the alleged negligence, pleaded that their liability was only to execute such works to so much of the wall as was below the level of the highway as in their opinion were necessary to maintain the highway.

Sydney G. Turner, K.C., and *A. W. Cockburn* for the plaintiffs.

A. M. Trustram Eve, K.C., and *Erskine Simes* for the defendants.

Turner, K.C.: The walls are part of the highway. The defendants have in fact in 1910 and 1936 repaired these walls. The liability of the defendants is so to maintain the roads as to render them suitable for modern traffic. The fence-walls are in such a state as to be a nuisance, and a danger to the plaintiffs' workmen. When a highway is a nuisance, a person suffering damage has a right to come for relief. [Counsel referred to *R.* v. *Lordsmere* (*Inhabitants*) (6), *Reigate Corpn.* v. *Surrey County Council* (7), *Sandgate Urban District Council* v. *Kent County Council* (3), *Butt* (*Henry*) *& Co.* v. *Weston-super-Mare Urban District Council* (8), *Sharpness New Docks & Gloucester & Birmingham Navigation Co.* v. *A.-G.* (9), *Nicholson* v. *Southern Ry. Co. & Sutton & Cheam Urban District Council* (10), *Baron* v. *Portslade Urban Council* (11), *A.-G.* v. *Shrewsbury* (*Kingsland*) *Bridge Co.* (12), *A.-G.* v. *Staffordshire County Council* (4), *Whyler* v. *Bingham Rural Council* (5), *R.* v. *Thomas* (13), and *Burgess* v. *Northwich Local Board* (14).]

Eve, K.C.: On the facts, there is no liability established on the part of the defendants. Further, there can be no liability in law on the part of the defendants. There is no misfeasance, even if it can be shown that there has been non-feasance. There is no evidence that the highway is not fit for ordinary traffic, nor that it is out of repair. Nor is there evidence of any existing nuisance, public or private. The only remedy (if any) is a claim for compensation. In any event, the act complained of, *i.e.*, the raising of the roadway, was done more than 6 months ago, and the authority is protected by the Public Authorities Protection Act, 1893. The fence-wall is no part of the highway. [Counsel referred to *R.* v. *Llandilo Roads Comrs.* (1), *R.* v. *Oxford & Witney Turnpike Roads Trustees* (15), *Morgan* v. *Leach* (16), *Gibraltar Sanitary Comrs.* v. *Orfila* (17), *Cowley* v. *Newmarket Local Board* (18), and *Sydney Municipal Council* v. *Bourke* (19).]

GODDARD, J.: This is an action which is brought by the Attorney-General at the relation of Ormerod Taylor & Son, Ltd., and by Ormerod Taylor & Son, Ltd., against the defendants, the Todmorden Borough Council, seeking a declaration that the defendants are liable to maintain and repair a certain retaining-wall and a fence-wall which abut on a highway and in parts support it, the highway leading from the town of Todmorden to Littleborough and Rochdale. It also asks for a declaration that the present walls are in such a state of disrepair as to be a nuisance, and for an order on the defendants to abate the nuisance. At the close of the plaintiffs' case, Mr. Eve submitted that he had no case to answer, either in law or in fact. The case has raised some very interesting arguments, and I have had cited to me a large number of statutes, and I am of opinion that in law no case has been made out, and that, therefore, I can give judgment without calling upon Mr. Eve to call his evidence. In my judgment, the plaintiffs have not anything like proved to me the state of facts which they set out to prove.

The facts of this case, so far as it is necessary to state them, are these. The road in question is a main road which enters the borough of Todmorden and passes on to the county of Lancashire. The road is no doubt an ancient highway; it passes up and around a hill, and, as the land falls away somewhat sharply down the hill, it is supported by an
A embankment. That, of course, is a very common construction for roads in all parts of the country, more particularly in hilly districts such as are found in the West Riding and in Lancashire. To strengthen that embankment, there is a retaining-wall, which is on the plaintiffs' property, because the plaintiffs own a mill which abuts on to this
B road. In fact, part of the mill buildings actually touch and support the road. This wall is a wall which extends from the ground up to some distance above the level of the footpath, and there is no doubt that formerly it formed a fence higher above the footpath than it is now. I think that the only conclusion I can draw from the evidence is that it
C was built at the same time as the burr-wall, as it is called in Yorkshire, although it is referred to in the south as a retaining-wall. The object of the fence-wall was no doubt to afford some protection to people who were going either up or down this road, and to prevent them from either walking over or falling over the slope. This wall is a dry stone
D wall, not cemented, in the part which is complained about. At some time quite recently, the borough council or the county council did some repairs to a part of that wall, and built a much more modern wall, but, with regard to the part of the wall that is complained about in this action, it is, as I say, an old wall. No one knows how long it has
E been there. It would be fair, I suppose, to say that it has been there at least 100 years, and, so far as I have had evidence about it, it seems so far to have performed its functions exceedingly well.

Many changes have taken place in the road during the time that the wall has been there. This wall has remained there during the time that
F motor-traffic has come upon the road, and it is there now, very much the same, not exactly the same, as it has been for the last century, or, at any rate, as long as it is known to have existed. It is true that from time to time, as is the case with any road, I should think, or with any wall, defects are found. It was given in evidence before me that there have
G been one or two small collapses of walls in recent years in this neighbourhood. But the way it was put by the expert engineer who was called is this: the road was not constructed in accordance with the best modern engineering practice, it was constructed many years ago when road engineering was in a condition very different from what it is now, and
H when the standard was entirely different, but no one can say that this wall is not functioning perfectly properly. It has functioned since the advent of the motor car and the motor lorry. There has been no fall of this wall, except in one place which has been repaired, and, at the present time, the road is in a perfectly good condition. The road—I do not say the surface of the road—is standing up to heavy traffic, the

sort of traffic which one might expect on a road which links together two manufacturing districts, the district of East Lancashire and the district of West Yorkshire, and is performing its functions perfectly well. Nor is there any indication of any recent settlement. That there have been settlements or movements there is no doubt, because the wall has bulged from time to time in places, as one very often sees A these walls about the country bulging from time to time. No one suggests that there is any indication that the bulge is getting bigger, nor that there is any indication that the wall is in a dangerous condition, except that the wall is composed of loose stones, not cemented together. In those circumstances, I cannot hold that this wall is a public or a B private nuisance. It does not seem to me to come anywhere near it. I do not think that any exhaustive definition of "nuisance" has been given, but in HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 24, the authors of the article on *Nuisance* say, at p. 18 :

C

> Nuisances may be broadly divided into : (i) acts not warranted by law or omissions to discharge a legal duty, which acts or omissions obstruct or cause inconvenience or damage to the public in the exercise of rights common to all His Majesty's subjects ; (ii) acts or omissions which have been designated or treated as nuisances by statute ; (iii) acts or omissions connected with the user or occupation of land which cause damage to another person in connection with the latter's user or occupation of land.

D

The way the case is put is this : apart, at the moment, from the public aspect of the case, the real object of this action—we know the plaintiffs are bringing it, of course, but I am considering the real object—is this. Messrs. Ormerod Taylor & Son want to enlarge their factory, and they want to build along the road frontage. I do not say that they necessarily E want to touch the road, but, finding that there is this wall, which does not look a very good wall, although it is performing its present functions there, they say that they would like to see a new wall there before they begin to build their factory. I do not wonder. I daresay that, on seeing this wall, a prudent owner would say to himself : "The F wall may fall in." An architect might say that, whatever repairs were done, the wall might fall in, unless the county council or the borough council who carried out the work proceeded to put a large buttressed wall along the line of this present wall. At any rate, they want to have the necessary repairs done to this wall before they begin to G build. I think they have overlooked the fact that the borough council here are not bound to give them a wall which may be satisfactory to them as building owners. The duty and obligation of the borough council with regard to this wall are to maintain the road, and nothing else. On the evidence, however, I am not prepared to hold that H there is any danger of the road coming down at the moment. I cannot see any evidence upon which I can hold that this is a nuisance, nor do I see, on the evidence that has been given to me, that I should be justified in holding that the borough council are not duly carrying out their statutory duty of maintaining the road. There is the road, and it is a perfectly good road at the present time. Traffic is passing and repassing along the road, and I do not suppose any road exists anywhere, not even the new by-pass roads, in regard to which somebody could not come forward and say it would be better if this, that, or the other were done. That aspect of the case brings me to consider, and I think that in this case it is necessary to consider only very briefly, the law that is applicable to the subject.

In the first place, it has been the law for a great number of years that one can bring no action against a highway authority, whether that highway authority be the inhabitants at large, as they were before the Act of 1835, so that one can say they were the persons liable to repair, or the Surveyor of Highways after 1835, or the local boards or councils, who have, by virtue of one Act or another, become in later years the highway authority, and liable to maintain the roads. I think that opinions may very well differ as to whether or not that is a desirable state of the law. It is very ancient law. With regard to the immunity of these persons from action, in days gone by prosecutions were exceedingly common, not prosecutions of the county but prosecutions at quarter sessions, against the inhabitants for not repairing their roads or bridges. The bridges, at any rate later, came under the county jurisdiction, but the inhabitants were prosecuted for not maintaining their roads, and it has always been the law of England that one cannot bring an action against a highway authority for failure to carry out the duties of repairing and maintaining the highways which the law imposes upon them. If, in the course of their duties with regard to the highway, the highway authority commit an act of misfeasance—that is to say, some negligent act of commission—then, as a consequence of that act, an action can be brought. There are many reasons that have been given for this immunity. I have not heard any evidence about it, and, so far as I have come to a conclusion of fact, I think that the council are attending to their roads very well. Many people, however, may think that the time has come when it is desirable to reconsider this question of the immunity of the council, an immunity which exists at common law. Although the great virtue of the common law is that it can be moulded and developed by the judges so as to be fitted to the requirements, and to the changing requirements, of modern life, with respect either to commerce or to habits of life or to other social matters, yet, where a rule of law has become fixed by decision, it is not open to judges to-day to alter the law in this respect, which has always been the law from its development, and the remedies that are to be found in the legislation. I am stating no opinion of my own as to whether it is desirable or not, and it is not my function, but it seems to me perfectly clear that the law has not been altered. Mr. Turner, in the course of a very interesting argument, submitted that, as regards the borough council, the law had been changed, because, in the Local Government Act, 1929, it does not provide that the liability of the Surveyor of Highways should attach to the counties or boroughs which now have to maintain the county main roads, or to the urban authorities who have certain rights in those statutes which preserve to them the main roads running through their boroughs. Mr. Trustram Eve has submitted that those sections do not really apply, and that this defendant council are in exactly the same position as they were under the Public Health Act, 1875, s. 144. I have not considered that matter very care- A fully, but I think that that very likely is so, and, if this case goes any higher, it will be for Mr. Eve to maintain that position. But I am clearly of opinion that there has been no change in the law, either by virtue of the statute of 1888 with regard to the county council's duty of repairing county roads or by virtue of the Local Government Act, 1929. B It would be a most extraordinary thing if a common law immunity from action which is certainly stated to be the law in so ancient a book as BROOKE'S ABRIDGEMENT, and which was reaffirmed in a case in 1788, *R.* v. *Llandilo Roads Comrs.* (1), and has been constantly reaffirmed ever since, were taken away, and the whole law with regard to highway C authorities in this respect altered, by reason of the mere omission of the word " liabilities " from the Act of 1929, which was really dealing with the financial responsibilities, and showing where the duty to repair roads in these various counties existed. That was the opinion I formed in the very early stages of this case, quite independently of the case of *Maguire* D v. *Liverpool Corpn.* (2), to which my attention was directed, in which the very point arose, it is true, not under the Local Government Act, but under the Liverpool Corporation Act, but the point of principle in these cases cannot be distinguished. After a very long and elaborate argument in the Court of Appeal, in that case, it was held that the rights, duties, E immunities, and liabilities remained the same as before on the Liverpool Corporation, who had the duty of repairing the particular street there.

The only other matter with which I think I need deal is this. As I have said, the duty of the defendants in this case is not to give the plaintiffs, either as members of the public or as adjoining owners, any F particular sort of wall, or any wall in any particular state of repair. Their duty is to keep the highway in repair. There is no evidence before me that the highway is out of repair. This wall, at any rate so far as the burr-wall is concerned, is not, in my judgment, a part of the highway. It is a work which it is necessary to maintain in order to keep up the G highway, and, therefore, the duty of maintaining it, under the authority of *Sandgate Urban District Council* v. *Kent County Council* (3), is in the defendants, and, if it be necessary, in order to maintain the road, to do some work to the wall, then they are bound to do the work to the wall, and they can do it as and when they like. There is a long line of authority H which shows that the court will not interfere, by mandamus or by action or by any other means, to enforce the duty, because the duty lies upon the highway authority, and they are liable, and the inhabitants are liable to certain penalties by way of indictment. The authority themselves may be liable to a summary penalty under the Highway Act if they do not carry out their duties, but the court will not pronounce upon the question of whether they are guilty or not guilty of not carrying out repairs, and the court will not dictate to the authority how it is to carry out those repairs. For instance, in this particular case, as I put it in the argument, I dare say it may have been an unwise thing to do, and I do not suppose for a minute that the council would dream of doing it, but, if this wall did get into a dangerous condition, so that they, in the exercise of their duty, thought it wise to repair it, they could pack it just as they like, and as often as they liked, without coming under any liability to anybody. It might put the defendants to a certain amount of inconvenience, but there it is. It is the statutory duty of the corporation to keep this wall in repair, that is to say, in a state of repair sufficient to support the road, which it is apparently doing at present. I do not think, in view of *A.-G.* v. *Staffordshire County Council* (4), a decision of Joyce, J., given after a very elaborate argument, in which the cases were reviewed from very early times, that it is really conclusive of this case, except for one thing. It is said that there is here an act of commission. I might say that, even if I came to the conclusion that the wall was out of repair and was a nuisance, if it was a nuisance simply caused by non-repair or failure to repair, then, although it might constitute a nuisance in the sense of being a danger, I think that the authorities show that an action is not the appropriate remedy, and that it should not be brought by action. They should proceed either before the justices or possibly by indictment. But the way in which the plaintiffs have endeavoured to put the case, so as to show an act of misfeasance, is this: it is said that from time to time the level of the road has been raised. There is no doubt that it has been raised. There may be some doubt as to how far it has been raised, but that raising has taken place is undoubted. It could not be otherwise. Quite apart from the fact that the Public Health Act applies, and gives express power to the highway authorities to raise roads, if they wish to level or raise roads, it would be very difficult to see how, especially in these days, one could repair an ancient road, or maintain it in a condition so that it was fit to carry modern traffic, without raising it. It is said that that has created a danger, because an additional pressure is put upon this wall. Quite apart from the fact that I think the Public Authorities Protection Act would be an answer to that, because there is no evidence of any work having been done within six months of the writ being issued, although I should be very sorry to have to decide it on that point, it has not been proved to me that any real damage has been done to this wall. It is only an opinion of an engineer that, as you raise the level of the road, so you increase the angle of pressure which is applied, and, therefore, it would be more likely to bring about the collapse of a wall. I cannot enter the realms of speculation of that sort. There is no such evidence here that this retaining-wall has been weakened or rendered unsafe by putting down this extra material on the road, although I think that probably, if the facts showed that to be the case, the council, in exercising their undoubted right of raising the road, ought as a matter of common precaution to take some steps with regard to strengthening the wall. That would not be a mere act of omission ; it would be an act of commission and a misfeasance, because they would be carrying out the act of raising the road improperly. I do not think that there is any evidence of that.

The other matter that has been mooted here is this. It has been said that the council have committed a misfeasance in raising the road, because the effect of raising the road has been to decrease the height of the fence-wall which protects this road. The position with regard to the fence-wall, I think, is very obscure. I think it must have been built, on the evidence, at the same time as the burr-wall was built. It was built as one wall. The real complaint of the plaintiffs is—they are not complaining as members of the public in this case—that, the raising of the footpath having thereby lowered the height of the fence-wall, there is rather a greater attraction to small boys to jump over it into their grounds than previously existed, and there is a tendency sometimes for small boys to push off the coping-stones, or for cyclists or somebody else to lean against the wall, on taking a rest in going up the hill, and that sometimes stones fall over. There is no evidence at all, so far as that goes, that this burr-wall is improperly constructed. I think it is common knowledge that all these stone-walls in the north of England, or most of them, at any rate, are dry walls, from which you can dislodge the stones if you like, and I have no doubt that mischievous boys do, but that is not a matter for which the defendants can be made liable. In point of fact, the defendants are under no liability or duty to put up a fence-wall at all, and, with regard to the fence-wall, although it is part and parcel of the wall as a whole, so far as it comes above the level of the ground I do not think I am justified in saying that it is either part of the highway or a necessary adjunct to the highway. The road authority, whichever it was, which put it there need never have put it there at all. There is authority for this, that, if a local authority does put up a fence at a dangerous place in the road, and then removes it at a time when danger might be expected, so that somebody who knew there was a fence there, and had a right to expect it still to be there, is injured by its having been taken away, that person can take an action, or his dependants can, if he is killed, because of the fact that it amounts to laying a trap for somebody. That is a case that is referred to in the judgment in *Whyler* v. *Bingham Rural Council* (5). There the council had put up a fence railing off a ditch, which was dangerous, and somebody who had known the place for a number of years, and knew that there was always a fence there, came along, after the local authority had taken the fence away, and was drowned, and it was held that his representatives had an action. One can well understand that, because that is creating a trap ; one has the fence there, fencing off a dangerous place, and it is taken away without warning. In this case, this fence-wall is 2½ ft. high. It is true a fence-wall 2½ ft. high is perhaps not as effectual a barrier as a fence-wall 4 ft. high, but no accident has ever taken place here. It has been reduced in height for a considerable time, so that there is no suggestion of laying a trap. It cannot be contended that there is any positive duty upon the borough council to put the fence there, nor, as I see the law, is there any duty on the borough council to maintain it. If they were suddenly to take it away, so as to leave a trap, and were to give no warning of it, then they might be held liable to a person who had been accustomed to find a fence there and who was injured. That is the sort of consideration that one has to apply to the facts of this case. There is the protection which the road authority kept there; I do not think that they were bound to keep it there. At any rate, I am not prepared to find that there is any nuisance or danger to the public, at the present time, on this evidence, and I do not find that Messrs. Ormerod Taylor & Son have given any evidence that they themselves are damaged by reason of the fact that this road has been raised.

In all the circumstances of the case, it seems to me that there is no evidence which I can hold discloses any liability on the defendants. In that case, I certainly cannot grant a declaration. I think the case fails, and must be dismissed with costs.

Action dismissed with costs.

Solicitors: *Torr & Co.*, agents for *Eastwoods, Sutcliffes, Sager & Gledhill*, Todmorden (for the plaintiffs); *Kenneth Brown, Baker, Baker*, agents for *Sir Charles McGrath*, Wakefield (for the defendants).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

McCARTHY *v.* PENRIKYBER NAVIGATION COLLIERY CO., LTD.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Romer and MacKinnon, L.JJ.), **November 22, 23, 1937.**]

Mines—Coal mine—Minimum wage—Rate of minimum wage applicable in particular case—Whether within jurisdiction of the court or the trade tribunal.

Lord St. Aldwyn's Award, made under the Coal Mines (Minimum Wage) Act, 1912, provides that the following questions shall be referred to the trade tribunal: (*a*) as to whether a workman is one to whom the minimum rate applies; (*b*) whether the workman has complied with the rules of the award; and (*c*) whether such non-compliance has worked a forfeiture of his right to the minimum rate. A workman brought an action in the county court to decide the rate of minimum wage applicable to his particular case, and the county court judge stayed the action as being a matter to be submitted to the trade tribunal:—

HELD: the only question in dispute being the particular rate to which the workman was entitled, this was a proper matter for trial in the courts and ought not to be referred to the trade tribunal.

[**EDITORIAL NOTE.** Under Lord St. Aldwyn's Award, made under the Coal Mines (Minimum Wage) Act, 1912, the matters which are to be referred to the trade tribunal are to be strictly confined to the following two: (*a*) the right of the workman to the minimum wage; (*b*) whether or not the workman has forfeited that right. All other questions must be decided by the courts in the usual way.

As to Minimum Wage, see HALSBURY, Hailsham Edn., Vol. 22, pp. 749-752, paras. 1570-1576; and for Cases, see DIGEST, Vol. 34, pp. 733-737, Nos. 1128-1146.]

Case referred to:

(1) *Barwell* v. *Abercarn Black Vein Steam Coal Co., Ltd.*, [1915] 2 K.B. 256; 34 Digest 736, *1137*; 84 L.J.K.B. 1105; 112 L.T. 806.

Appeal from the decision of His Honour Judge Clark Williams, K.C., in the county court holden at Mountain Ash on Nov. 3, 1936, when he held that he could not proceed with the hearing of the action until proceedings had been taken by the trade tribunal under the Coal Mines (Minimum Wage) Act, 1912, ss. 1, 2. The applicant was a collier paid for coal and dead work, i.e., at piece-work rate. About the beginning of Oct., 1935, a fall occurred. He was told by the foreman to clear the fall, and therefore could not earn piece-work rates, but was paid at a collier's day-work rate. He claimed to be paid at piece work rates.

Maxwell Fyfe, K.C., and *Joshua Davies* for the appellant.

Trevor H. Hunter, K.C., and *Gwyn Rees* for the respondents.

Fyfe, K.C.: It is submitted that a reference to the trade tribunal is applicable only where there is a dispute as to the workman's status, e.g., a dispute as to whether the plaintiff was a collier or a workman in some other grade of employment. In this case there is no question as to his status, because he was in fact paid the minimum rate for colliers. There is no suggestion that he had forfeited his right to the minimum rate, and the only question is as to which minimum rate he was entitled. Therefore there is no dispute between the parties as to any question to be referred to the trade tribunal.

Hunter, K.C.: The real point is whether a man, having been paid upon rate " B " and wanting rate " A ", can rush to the county court, and so deprive the employer of defences that are open to him before the domestic tribunal but not before the county court. These defences are those set out in sect. 1 (1) of the Act of 1912. The plaintiff knew of this wage-rate dispute and that negotiations were on foot between the employers and the union, when he commenced these proceedings in the county court.

Sir Wilfrid Greene, M.R.: The appellant in this case is a collier employed at the respondents' Penrikyber colliery. According to his own evidence, which was not contradicted, he had been employed for some time on piece-work rates driving the main dip heading. Before he had finished his work on that heading, a big fall occurred, with the result that he could not get the coal, and he was employed at clearing away the debris left by the fall. He was so employed from the week ending Oct. 18, 1935, to the week ending Nov. 29, 1935. In respect of the work that he did during that period he was paid at the rate of 6*s*. 9*d*.

a day. The present action was brought by him to recover the sum of 1*s.*, and it was based upon the contention that the appropriate rate applicable to his case under the Coal Mines (Minimum Wage) Act, 1912, was not 6*s.* 9*d.*, but 6*s.* 10½*d.* In order to enforce his claim, he issued his plaint in the county court of Glamorganshire, and the action came on to be heard before His Honour JUDGE CLARK WILLIAMS. The judge decided that he could not proceed with the hearing of the case upon the ground that there was a dispute between the plaintiff and the defendants as to the rate of minimum wage applicable to the case, and, accordingly, he stayed the proceedings pending the determination of that matter by the tribunal set up pursuant to the Act. The question that comes before us upon this appeal is whether or not he was right in holding that that particular matter of dispute was one which could be decided by that domestic tribunal only, or whether it is a matter with which he himself was entitled to deal.

The point is one of some little difficulty, and it has been the subject-matter of *dicta* in a previous decision of this court in *Barwell* v. *Abercarn Black Vein Steam Coal Co., Ltd.* (1), in which BUCKLEY and PHILLIMORE, L.JJ., expressed a view one way and PICKFORD, L.J., expressed another. The county court judge expressed his own opinion on the matter, and that opinion agreed with the views expressed by BUCKLEY and PHILLIMORE, L.JJ. The question which we have to decide, therefore, is whether or not the view taken by PICKFORD, L.J., was preferable to that taken by the other two Lords Justices.

The Coal Mines (Minimum Wage) Act, 1912, made provision for the payment of wages at a minimum rate to workmen employed underground in coal mines. Under sect. 5 of the Act, the expression " workman " is defined as meaning " any person employed in a coal mine below ground other than " certain specified workmen who are not included in the definition. Sect. 1 (1) provides the method by which a minimum wage is to be brought into effect. The method, shortly stated, is this. It is made an implied term of every contract in which such a workman is employed that he shall receive wages at not less than the minimum rate. The subsection then proceeds to refer to cases in which such a term is not to be implied, and the condition upon which the implication of such a term is not to take place is the making of a certificate, in the manner indicated, to the effect that either the workman is a person excluded from the operation of the minimum wage provisions or he has forfeited his right thereto. The actual language of that subsection is as follows :

> It shall be an implied term of every contract for the employment of a workman underground in a coal mine that the employer shall pay to that workman wages at not less than the minimum rate settled under this Act and applicable to that workman.

Pausing there, the method adopted is to write into the contract of the man a particular term under which he is entitled to a minimum rate applicable to his case. Then comes a provision which excepts certain cases from that. The subsection proceeds:

> unless it is certified in manner provided by the district rules that the workman is a person excluded under the district rules from the operation of this provision, or that the workman has forfeited the right to wages at the minimum rate by reason of his failure to comply with the conditions with respect to the regularity or efficiency of the work to be performed by workmen laid down by those rules; and any agreement for the payment of wages in so far as it is in contravention of this provision shall be void.

The latter part of the subsection, therefore, provides for two cases: (i) the case where the workman is excluded from the operation of this provision—that means that in his case no term is to be written into the contract entitling him to wages at the minimum rate; and (ii) the case where he is a person whose contract is in the first instance to have such a term in it, but the term is, so to speak, struck out because he has forfeited his right. Subsect. (2) then proceeds to deal with the content of the district rules, and it provides as follows:

> The district rules shall lay down conditions, as respects the district to which they apply, with respect to the exclusion from the right to wages at the minimum rate of aged workmen and infirm workmen (including workmen partially disabled by illness or accident)

Pausing there for a moment, in any case where the district rules exclude certain classes of workmen pursuant to that provision, no implied term will by the Act be imported into the contracts of those workmen. Those are workmen who, by the rules, would be workmen excluded from the operation of this provision within the meaning of subsect. (1). The subsection then proceeds:

> and shall lay down conditions with respect to the regularity and efficiency of the work to be performed by the workmen.

That is the necessary foundation for the operation of the second limb of the second part of subsect. (1) dealing with forfeiture for non-compliance with the conditions in respect to regularity and efficiency of the work to be performed. The first thing to be determined by the rules is what those conditions should be. I will omit for the moment another matter dealt with in subsect. (2), and will proceed a little lower down in the subsection:

> and shall provide that a workman shall forfeit the right to wages at the minimum rate if he does not comply with the conditions as to regularity and efficiency of work, except in cases where the failure to comply with the conditions is due to some cause over which he has no control.

That passage completes the matter necessary to be dealt with by the district rules in order that effect may be given to the second provision in the second part of subsect. (1), which deals with forfeiture.

The passage that I omitted dealt with another matter, and it is this: the rules are to lay down conditions "with respect to the time for which a workman is to be paid in the event of any interruption of work due to an emergency." That is a matter which is not relevant for any of the purposes mentioned in subsect. (1).

Subsect. (2) then proceeds with the following paragraph, upon which the question in this case really arises:

> The district rules shall also make provision with respect to the persons by whom and the mode in which any question, whether any workman in the district is a workman to whom the minimum rate of wages is applicable, or whether a workman has complied with the conditions laid down by the rules, or whether a workman who has not complied with the conditions laid down by the rules has forfeited his right to wages at the minimum rate, is to be decided, and for a certificate being given of any such decision for the purposes of this section.

That provision, therefore, provides that the rules are to provide for the setting up of a special tribunal, whose function it will be to decide the issues of fact therein referred to. The issues of fact are, in terms, three; the two last-named are really linked together, that is to say, whether the workman has complied with the conditions, or whether the workman who has not complied with the conditions has forfeited his right to wages at the minimum rate. Both those matters are matters relevant to the question of forfeiture, which is dealt with in the second part of subsect. (1). The real question in this case is: Does the first part of that provision—namely, whether any workman in the district is a workman to whom the minimum rate of wages is applicable—apply only to the exclusion of the workman mentioned in subsect. (1), or does it extend to cover the case of a man admittedly entitled to payment at minimum rates, but with regard to whom there is a dispute as to the particular rate applicable to his case?

In the present case, the actual rules which were made for the purpose of giving effect to those provisions are to be found in what is commonly known as Lord St. Aldwyn's Award, made under the provisions of the Act. Under that award, minimum rates of wages were fixed for different classes of workmen in the South Wales coalfield. There are three rates mentioned in the schedule, to which I must refer. The first rate is for a collier in charge of a working place, who is a regular piece worker, and is:

> prevented from earning piece-work wages by a fault in the seam or other cause arising in the colliery and beyond his own control.

Those are the relevant parts of that item, and the minimum wage set against that item is 4*s.* 7*d.*, which, with the percentage addition, becomes 6*s.* 10½*d.*, the rate which the plaintiff in the present case claims as the rate appropriate to himself. The next item is this:

> Collier in charge of a working place, who is not a worker at piece work . . . 4*s.* 4*d.*

In point of fact, the percentage addition to that would give a figure of 6*s.* 6*d.*, but in this particular colliery the recognised rate of wages for colliers falling under that description was 6*s.* 9*d.*, which was the rate actually paid to the present appellant. The other item is: "Timbermen and repairers or rippers doing timbering work." For those men there are two regular rates, one for regular piece workers and one for day-wage men. It would appear from the language of the first two of those items that the substantial dispute, if there be substance in it, between the parties is whether or not the present appellant was a regular piece worker entitled to a wage at the rate of 6*s.* 10½*d.*, or whether he was a collier in charge of a working-place, and not a collier on piece work, in which case he would be entitled to a rate of 6*s.* 9*d.* only. There is a suggestion also that he might come under the third item which I have mentioned, that is to say, timbermen and repairers or rippers doing timbering work. I think that that was the item to which Mr. Trevor Hunter referred.

The second schedule to Lord St. Aldwyn's Award contains matters which by the Act it is required to contain, and the particular relevant paragraph is para. 8, which provides as follows :

> Should any question arise as to whether any particular workman employed underground is a workman to whom the minimum rate is to apply, or whether a workman has failed to comply with any of the conditions contained in these rules, or whether by non-compliance with any of these rules, such workman has forfeited his right to the minimum rate, such question shall be decided in the following manner . . .

Then it sets out various methods which are to be pursued, first of all, by agreement, secondly, by referring the matter to the officials of the mine and to members of the committee of the local lodge, and so on. The tribunal has been conveniently referred to as the "trade tribunal." The first matter which I think is clear upon the construction of that particular paragraph is that it is intended to deal, and to deal only, with the matter provided for in the second paragraph of sect. 1 (2) of the Act. That is the paragraph which I have already read, and which provides that the district rules shall make provision with regard to those matters. There are some slight differences in language, but, in my opinion, there is no difference in the import of the language used. The paragraph is one intended to give effect, and to give effect only, to that particular provision of the Act. Accordingly, it is unnecessary to refer to it any more. Turning back to the language of the Act, and looking again at the second paragraph of sect. 1 (2), it is to be observed that, of the three matters there mentioned, with regard to which the rules are to set up a domestic tribunal, the two last are unquestionably concerned, and concerned only, with determining whether or not, under the forfeiture provisions of subsect. (1), the workman has lost his right to claim wages at the minimum rate. But the language of the first provision is the one which gives rise to difficulty. I will read it again. "Whether any workman in the district is a workman to whom the minimum rate of wages is applicable." The controversy can be put into a nutshell by stating the two different constructions which were presented to us by the two parties. On behalf of the respondents, it was said that the words "the minimum rate of wages" mean "the minimum rate of wages which the workman in any particular case is claiming as payable to himself." The other construction, put forward on behalf of the appellant, is that the words "the minimum rate of wages" mean "the minimum rate applicable to the workman." The result of the two differing views would be that the view put forward on behalf of the respondents would lead to the result that a question of fact is to be referred to the domestic tribunal over and above the matters in respect of which a certificate is to be given under subsect. (1). It will be remembered that, under subsect. (1), the only matters in respect of which a certificate is to be given are, first of all, the exclusion of workmen from the benefit of the minimum wage provisions, and, secondly, the forfeiture by workmen of that benefit. It is in respect of those matters, and in respect of those matters only, that the certificate falls to be given. If the contention put forward on behalf of the respondents is the right one, a certificate would fall to be given for a further matter—namely, as to the rate applicable to a particular workman in a particular case. Under the other contention, the provisions of this paragraph of subsect. (2) will be limited so as to be co-extensive with the matters for which provision is made for a certificate in subsect. (1). In other words, the words " whether any workman in the district is a workman to whom the minimum rate of wages is applicable " will mean " whether any workman in the district is a workman excluded from the operations of the minimum wage provisions." Looking at the matter, first of all, apart from authority, there are some general considerations which should be stated. First of all, it is not the fact that the Act provides for all matters of dispute arising under it to be referred to this domestic tribunal, because there is one matter which quite clearly and admittedly does not fall within those provisions for compulsory reference, and that is the matter to which I drew special attention when I was reading the first paragraph of subsect. (2)—namely, the matter as to the time for which a workman is to be paid in the event of any interruption of work due to an emergency. That is a matter of fact which, in the case of dispute, would fall to be decided by the ordinary tribunals.

The next matter to which I wish to draw attention is one which was mentioned by Romer, L.J., in the course of the argument. The second paragraph of subsect. (2) provides that the district rules shall make provision for a certificate being given " of any decision upon the matters there referred to for the purposes of this section." The only purpose of the section for which a certificate is mentioned as being requisite is the purpose mentioned in subsect. (1), that is to say, the purpose of excluding workmen from the benefit of the minimum wage provisions, or the purpose of depriving them of the right they otherwise would have had owing to forfeiture for the reasons there mentioned. I think it is just to observe that, looking at the scheme and language of this paragraph in subsect. (2), it would be strange if, in a paragraph required for the purpose of making effective the provisions of subsect. (1) with regard to the matters of exclusion and forfeiture, another matter quite distinct from and apart from that should have been introduced as a matter for the domestic tribunal, and as a matter in respect of which a certificate should be given.

But there is, to my mind, an overriding consideration in approaching the construction of these provisions. As I have already said, the scheme by which the minimum wage is brought into existence imports a term for payment of that wage into every contract. Subsect. (1) categorically provides that in every contract such a term shall be implied, subject to two exceptions, and to two exceptions only—namely, the production of a certificate that a workman is excluded, or the production of a certificate that a workman has forfeited his right to wages. In any case, where no such certificate has been given, the very language of the opening words of the subsection directs that every contract shall be read as containing the implied term. The implied term is that the employer shall pay to the workman wages at "not less than the minimum rate settled under this Act and applicable to that workman." Accordingly, if the matter had stood there, in a case where the implied term was not excluded by the making of a certificate, the question of fact would remain to be decided, with reference to any particular workman, what was the rate applicable to that workman, the contract being treated as containing an undertaking to pay the workman the rate applicable to him. If a question ever arose as to what was the rate applicable to a particular workman, that would be a question which would have to be ascertained upon the true construction of the contract, read with that implied term in it, as applied to the particular facts of the case. If the contention of the respondents is right, the provisions for compulsory reference to the trade tribunal have dealt, not merely with the matters relevant to the question whether or not the term ought to be implied, but also with matters depending upon the true construction of that term and its applicability to the facts of the case. In other words, it would be importing into the area of compulsory reference a matter different in kind and different in effect from the two particular matters in respect of which a certificate may be given for the purposes of subsect. (1).

It seems to me that very clear language would be required to produce that result, and, if I may again return to the point mentioned by Romer, L.J., it does give added weight, in my judgment, to the point with which I have just been dealing. The point to which I refer is the reference, at the end of the second paragraph of sect. 1 (2), to the certificate for the giving of which the rules are to provide "for a certificate being given on any such decision for the purposes of this section." The certificate is required under subsect. (1) for the purpose, and for the purpose only, of deciding whether or not an implied term is to be imported into the contract. It is not required under subsect. (1) for the purpose of enabling a question arising under that implied term to be decided. The reference to the purposes of this section appears to me to lay down the limits within which the district rules are to operate, and to limit the reference to the domestic tribunal on the question "whether a workman in the district is a workman to whom the minimum rate of wages is applicable" to the question of whether or not he is what I may, for convenience, call, a "minimum-wage man." He will not be a minimum-wage man if, according to the district rules, he is excluded from that class. Directly he gets into that class, the implied term is imported into his contract, and the further question then arises as to the rate applicable to him. I cannot read the provision as submitting to the domestic tribunal that further question in a case where the man is admittedly a minimum-wage man.

A That is the decision to which I should come, apart from any authority on the matter. It is contrary to the decision to which the county court judge came, again without reference to authority, because he has given us, in a particularly careful and lucid judgment, his own reasons for coming to the decision to which he came, a decision contrary to that to B which I myself have come. But it is necessary to examine what has been said on this subject in the previous decision of this court, to which the county court judge referred. That decision is in the case of *Barwell* v. *Abercarn Black Vein Steam Coal Co., Ltd.* (1), a case in regard to the same award of Lord St. Aldwyn. The precise question which was C involved in that case arose in this way. The workman was claiming a minimum wage, and it appeared that there was a dispute pending between the parties, and it was admitted that that dispute had been submitted to the tribunal set up under para. 8 of the second schedule to the district rules. The county court judge and the Divisional Court, in that case, D had held, following an earlier decision, that it was not competent to the workman to maintain the action without producing a certificate of the tribunal to which the matter in dispute had been referred. This court, consisting of BUCKLEY, PHILLIMORE and PICKFORD, L.JJ., overruled that earlier decision, and held that the production of such a certificate E was not a condition precedent to the plaintiff's right to maintain the action. The matter was remitted to the county court judge with the directions indicated in the judgment, substantially to the effect that, in the first instance, it is not for the workman to produce the certificate, because the certificate under subsect. (1) is not a matter upon which the F inclusion of the workman within the class to be benefited depends, but is a matter which would exclude him from the class to which *prima facie* he would belong, and, therefore, is a matter of defence to be set up by the employers who alleged the existence of such a certificate. It was also pointed out that, once it appeared that a matter of fact had been raised G which fell within the jurisdiction of the domestic tribunal, that necessarily deprived the court of the power to proceed with the matter until that matter had been decided upon the ground that the statute has removed those particular issues of fact from the jurisdiction of the court and transferred them to the domestic tribunal. In the course of the judgments, H however, certain observations were made which were not necessary for the decision, but which bear upon the point now in issue. BUCKLEY, L.J., said that, in addition to the matters which are quite clearly matters in which the domestic tribunal alone has jurisdiction, there might be other matters over which it had jurisdiction. He said at p. 263 :

> There may, however, be a matter for arbitration. A man may be a workman

> having regard to sect. 5, and there may still be a question as to what class of workman he is. For instance, is he a collier, or a filler, or a timberman; a different rate of wages may be applicable to each of those classes of workmen. That question is not determined by the Act, and may be the subject of arbitration.

I read that merely as a tentative expression of opinion upon a matter which the court was not really concerned to decide in that action. But the effect of that view so tentatively expressed, if it be right, would be A that, in the present case, it would be a matter for the domestic tribunal to decide what was the rate applicable to this particular workman, notwithstanding the fact that it is not contended that he is not a workman entitled to the minimum rate. Then PHILLIMORE, L.J., said at p. 267: B

> There may be questions upon the construction of the Act as to the conditions entitling the workman to sue which the court must determine, but at the same time it is probable—though I do not decide it—that there are other matters which if disputed must be determined by the trade tribunal. "Wages at not less than the minimum rate settled under this Act and applicable to that workman" may necessitate inquiry as to what class of workman he belongs to. Under the rules in this district there are numerous classes of workmen with a standard rate of day C wages applicable to each class, and it is obvious that there may be questions as to the rate of remuneration payable to a workman, questions which would have to be determined and would be best determined by the trade tribunal, and which I am inclined to think are intended to be determined by that tribunal.

PHILLIMORE, L.J., is there dealing with the provision in the first part of subsect. (1) which describes what term is to be implied into the contract, D and he fully appreciates, as appears later in his judgment, the distinction between the two branches of that subsection, the first one dealing with the nature of the term to be implied, and the second one dealing with the circumstances in which the term is not to be implied. Nevertheless, he expressed again a tentative opinion that the matters arising under E the first branch might be proper for arbitration. PICKFORD, L.J., did not agree with those observations. He said, at p. 271:

> I am not sure that I take the same view—in fact I do not think I do—of the latter part of subsect. (2) as is taken by PHILLIMORE, L.J. In my view subsect. (2) is, with one exception, machinery for carrying out that part of subsect. (1) which follows the words "unless it is certified," which I will call the "unless" clause. F

That clause is that part of subsect. (1) which lays down the conditions under which the implied term is not to be imported into the contract. Then he deals with the second part of the "unless" clause, and then he says at p. 272: G

> I am inclined to think, though it is not absolutely necessary to decide it in this case, that that [the second paragraph of subsect. (2)] merely provides for the setting up of the tribunal to decide the matters mentioned in subsect. (1) and the first part of subsect. (2), and that the question "whether any workman in the district is a workman to whom the minimum rate of wages is applicable" means no more than this: whether he is a workman who is "excluded under the district rules from the operation of this provision" as mentioned in subsect. (1). It has been H argued that it refers to a question whether the workman is a workman to whom the particular rate of wages which he is claiming is applicable. I do not myself think that is its meaning . . .

It will appear, from what I have already said as to my own view upon the true construction of these not very clear provisions, that I prefer the view expressed by PICKFORD, L.J., to that expressed by the other two members of the court. The matter is entirely at large, so far as authority binding upon this court is concerned. The result, in my opinion, is that this court is free to express its own view upon the subject, and my opinion is that the contention of the appellant is correct.

There is one other matter which I should mention. In the corre-
A spondence which took place before these proceedings were instituted, a letter was written on behalf of the respondents raising a question that the workman had forfeited his right to wages at the minimum rate. I cannot help thinking that that was put in only for the purpose of completeness. When the statutory defence was delivered, it contained
B no specific reference to that matter, and the matter was not apparently argued before the judge, nor did he refer to it in his judgment. Indeed, the evidence makes it quite clear, to my mind, that no such case of forfeiture could have been suggested, and that it could not have been suggested that there was any dispute in respect of that particular
C question. The employers had paid wages at the rate of 6*s.* 9*d.*, and had never raised any question that the man was not entitled to a minimum rate of wages. The only question in dispute was the question as to which particular rate he was entitled to.

Mr. Trevor Hunter appreciated, very properly, if I may say so, that
D this point of forfeiture would not really be a point upon which he could insist, having regard to the fact that the parties both wished the substantial matter, the matter which I have already dealt with, decided. I think it right to say that, even if he had not made that concession, it would have been impossible for him, before this court, to say that a
E dispute had arisen with regard to forfeiture. He would be right in saying that, if a dispute had arisen with regard to forfeiture, and if the existence of that dispute had been proved to the satisfaction of the county court judge, the county court judge, pursuant to the principles laid down in *Barwell's* case (1), would have been compelled to stay the
F proceedings until that particular issue had been dealt with by the only tribunal competent to deal with it, namely, the trade tribunal set up under the district rules. But it is, I think, important to observe that, before the county court judge could have taken such a step, he would have had to be satisfied of the existence of such a dispute as a fact.
G I need only quote the language of PHILLIMORE, L.J., on that matter in one sentence in *Barwell's* case (1), at p. 267:

> Unless it is proved or admitted that there is some dispute justiciable by the trade tribunal the court proceeds in the ordinary way.

H In other words, the court is not entitled to stay proceedings unless it has come to the conclusion of fact as to the existence of a dispute necessary to give it jurisdiction to stay proceedings. In the present case, not only did the judge not find that as a fact, but also there was quite clearly no evidence upon which he could have so found. Accordingly, that matter disappears from the case.

The result is that the appeal must be allowed, and, as the only sum claimed is 1*s*., there must be judgment for that sum.

Romer, L.J. : I agree with the conclusions to which Sir Wilfrid Greene, M.R., has come, and with the reasons he has given for coming to those conclusions, and, were we not differing from the judge in the court below, I should content myself by saying merely : " I agree." As it is, I would like to add a few words of my own. The question we have to determine is a question as to the true construction of the second paragraph of the Coal Mines (Minimum Wage) Act, 1912, s. 1 (2). For, whatever language may have been implied in r. 8 of the second schedule to the award made under that Act in respect of the particular district with which we are dealing, it is quite plain that there would be no power under that award to refer to arbitration, or to what has been called the domestic tribunal, any question which the persons who made the award had no power to refer under the terms of the Act itself.

Turning back to the Act and to the second paragraph of sect. 1 (2), the real point to be decided is as to the meaning to be attributed to the words " the minimum rate of wages." Those words have occurred in the section three times before. They occur, first of all, in the fourth line of subsect. (1), that part of the section which implies into every contract of employment of a workman underground a term that the employer shall pay to that workman wages at " not less than the minimum rate settled under this Act and applicable to that workman." The next time that the phrase occurs is in the second branch of what has been called the " unless " provisions. He is to be paid that minimum rate unless it is certified that the workman has forfeited the right to wages at the minimum rate by reason of his failure to comply with the conditions in respect of the regularity or efficiency of the work. The third time it appears is in the first paragraph of subsect. (2), where it is provided that the rules shall make provision that a workman shall forfeit the right to wages at the minimum rate if he does not comply with the conditions as to regularity, and so forth. In those three places, the words clearly mean precisely the same thing, " the minimum rate settled under this Act and applicable to that work." Then we come to the fourth time that the words " the minimum rate " are used, and, according to the rules of construction, we must give to those words the same meaning there. In my opinion, the words " the minimum rate of wages " occurring in the second paragraph of sect. 1 (2) mean " the minimum rate settled under this Act and applicable to the workman in question." In other words, all that is referred to the domestic tribunal under the first part of this second paragraph is the question whether a workman who, merely looking at the schedule to the award, appears to be entitled to receive a certain minimum rate of wage is nevertheless disentitled from receiving that minimum rate of wage because he is excluded from the operation of these words. I think that that construction is borne out by the reference at the end of the second paragraph with which I have been dealing, by the provision that a certificate of the decision is to be given for the purposes of this section. Those words "for the purposes of this section" mean, I think, "the purposes of giving effect to the provisions of this section relating to the certificate." The only provisions of the section relating to the certificate previously mentioned are those provisions contained in subsect. (1) to which SIR WILFRID GREENE, M.R., has called particular attention. I therefore have come to the conclusion, and I agree, that this appeal must be allowed.

MACKINNON, L.J.: I agree, and I desire to add only one or two considerations in addition to those which have already been mentioned. It is not disputed that this workman is a workman to whom this legislation applies. The dispute is as to the nature of his employment, and, therefore, into which category he falls for the purpose of fixing his standard rate of wages. The question appears to be whether he was a collier who was a regular pieceworker, or a collier who was not a regular pieceworker. The whole scheme of the Act starts off by declaring that there shall be "an implied term of every contract of employment of a workman." That assumes what may be an unjustifiable assumption that there is a contract, the terms of which are ascertainable, under which any workman underground is employed. The terms of that contract, before you add the implied term, must obviously be ascertained by the county court judge, and it seems to be quite clear that the contract of employment of the workman would expressly or impliedly indicate the nature of the employment upon which he was engaged, whether as a regular collier on piecework, or as a collier not on piecework, or a workman employed in some other category. Therefore, the question as to what is the nature of his employment is a matter to be ascertained from the contract, and it is only when one has ascertained the terms of that contract that one adds to it the implied terms that the Act requires one should add to it. The other consideration which appears to point in the same direction is this. BUCKLEY, L.J., who indicated, in *Barwell* v. *Abercarn Black Vein Steam Coal Co., Ltd.* (1), that, in his view, it would be for the tribunal to decide whether a man was a pieceworker or a day worker, is careful to point out that there is a definition of "workman" in sect. 5, and that a question under that section would not be a matter for the arbitration tribunal, but a matter for the court. Sect. 5 says that the expression "workman" means "any person employed in a coal mine below ground other than a person so employed occasionally or casually only"—so that the county court judge, in ascertaining the terms of the employment in order to see whether he is to add the implied term, would have to ascertain whether or not the man was employed only occasionally or casually. It seems fairly obvious that it is a question of exactly that nature, whether the man is a piece worker or a day worker. One may assume that the arbitration tribunal is set up rather to deal with technical matters in regard to which they have expert knowledge, whereas the question whether the man has in fact been employed as a regular piece worker, regularly paid for the work he does, or regularly paid as a day worker, is a matter which involves no expert knowledge, and is a pure question of fact, like any other, which can be ascertained by any ordinary tribunal. I agree that the appeal succeeds.

Appeal allowed with costs. Judgment for 1*s*.

Solicitors: *Smith, Rundell, Dods & Bockett*, agents for *Morgan, Bruce & Nicholas*, Pontypridd (for the appellant); *Furniss, Stephen & Co.*, agents for *Arthur J. Prosser*, Cardiff (for the respondents).

[*Reported by* Reginald Townsend, Esq., *Barrister-at-Law.*]

GOADBY *v.* ORRIDGE.

[Court of Appeal (Sir Wilfrid Greene, M.R., Romer and MacKinnon, L.JJ.), **November 25, 26, December 8, 1937.]**

County Courts—Costs—Remitted action—Costs in High Court—Discretion of county court judge to give county court costs only—County Courts Act, 1934 (*c.* 53), *ss.* 47, 73.

An action was remitted from the High Court to the county court, no special order being made as to the costs before remission. The county court judge ordered the whole of the costs to be taxed under Scale C. The action was a claim for damages for negligence and the plaintiff recovered £60 damages :—

Held : the effect of the proviso (i) to the County Courts Act, 1934, s. 73, is to limit the discretion of the county court judge by compelling him, in the cases mentioned in sect. 47 of that Act, to award either no costs at all or only county court costs in respect of the proceedings before remission, where in his opinion the action ought to have been commenced in the county court.

Jenkins & Co. v. *Simon* (1) *distinguished.*

[**EDITORIAL NOTE.** It was held in *Jenkins & Co.* v. *Simon* (1) that a plaintiff cannot be deprived of costs merely because he has brought his action in the High Court and not in the county court. That case is, however, distinguished here, because it is a decision under the provision which is now sect. 47 (4) of the Act of 1934, and the question here arises under the earlier part of the section. In the present case there was no record of the county court judge's reasons for his decision, and it must therefore be assumed that he considered that this was an action which, in all the circumstances, ought to have been commenced in the county court.

As to Costs in Remitted Actions, see HALSBURY, Hailsham Edn., Vol. 8, pp. 357-360, paras. 758-762 ; and for Cases, see DIGEST, Vol. 13, pp. 490-492, Nos. 404-420. See NEW COUNTY COURT PRACTICE, 1938, pp. 48-52, 110-113.]

Case referred to :

(1) *Jenkins & Co.* v. *Simon*, [1926] 1 K.B. 111 ; Digest Supp. ; 95 L.J.K.B. 97 ; 134 L.T. 88.

Appeal by the plaintiff from a judgment of His Honour Judge Ruegg, given in the Birmingham County Court on May 3, 1937.

Colin Coley for the appellant.

P. B. Morle for the respondent.

Coley : Under the County Courts Act, 1934, s. 47, the plaintiff is entitled to High Court costs until the date of remission. He has recovered more than £50, and there is no power to deprive him of those costs merely because the case could have been commenced in the county court. Further, on the facts, the county court judge did not exercise
A his discretion judicially. [Counsel referred to *Jenkins & Co.* v. *Simon* (1).]

Morle : The principle is that, if a plaintiff brings an action in the High Court which he might have brought in the county court, the onus is upon him to justify choosing the High Court. *Jenkins & Co.* v. *Simon* (1) has no application here. By sect. 73 of the Act of 1934, the whole of the
B costs are in the discretion of the county court judge. The discretion of the county court judge was rightly exercised and cannot now be interfered with.

Sir Wilfrid Greene, M.R. [delivering the judgment of the court] :
C This appeal raises a question of importance with regard to the costs of actions remitted from the High Court to the county court. The action was remitted to the county court under the County Courts Act, 1934, s. 46, and on Apr. 20, 1937, judgment for the plaintiff was given in the county court for £60 and costs. In the minute of the judgment as
D recorded, no special direction appeared as to costs, and the registrar proceeded to tax the costs on the High Court scale down to the date of remission, and thereafter on column C of the county court scales. Thereupon the defendant on May 3, 1937, applied to the judge to amend the minute of the judgment by making the whole of the costs taxable
E on column C. This application was successful, and the plaintiff appeals against the order directing the minute to be amended. It was first argued that the minute as recorded correctly embodied the order as to costs made on Apr. 20, and that the judge had no power to vary that order. There is no written note of the judgment as delivered, and
F there was a difference of recollection on the part of counsel and solicitors as to what took place. We decided that, as the county court judge ought to be treated as having acted within his jurisdiction under the "slip" order (C.C.R., Ord. 15, r. 12) unless the contrary could be established, we ought to accept the respondent's counsel's statement as to
G what took place. That statement was to the effect that the judge had directed the whole of the costs of the action to be taxed on column C. Counsel for the appellant did not feel able, in the circumstances, to dispute the correctness of this decision. The appeal was accordingly treated as an appeal from the original order as to costs made on Apr. 20.

H When the order was made in the High Court remitting the action, no special order was made as to the costs of the action down to the date of remission. Accordingly, the costs of the whole proceedings, both before and after the order of remission, were in the discretion of the county court judge, subject to the provisions of the County Courts Act, 1934, s. 73. The question raised by the appeal is whether the county court judge had a discretionary power to give costs down to the date of remission on any scale except the High Court scale. It was admitted that, if he had such a discretionary power, there were no circumstances entitling this court to interfere with its exercise.

Sect. 73 provides as follows :

> Where an action, counterclaim or matter is ordered to be transferred (*a*) from the High Court to a county court ; or (*b*) from a county court to the High Court ; or (*c*) from one county court to another county court ; the costs of the whole proceedings both before and after the transfer shall, subject to any order made by the court which ordered the transfer, be in the discretion of the court to which the proceedings are transferred, and that court shall have power to make orders with respect thereto and as to the scales or columns on or under which the costs of the several parts of the proceedings are to be taxed, and the costs of the whole proceedings shall be taxed in that court : Provided that, as regards so much of the proceedings in any action transferred from the High Court to a county court as take place in the High Court before the transfer (i) the costs thereof shall be subject to the provisions of sect. 47 of this Act ; and (ii) the powers of the High Court or judge thereof under subsect. (3) of that section to make an order allowing costs on the High Court scale, or on or under any county court scale or column, shall, subject to any order of the High Court or the judge by whom the transfer was ordered, be exerciseable by the judge of the county court.

The first part of this section, as a matter of language, gives to the county court judge complete discretion as to all the costs. He may make orders :

> as to the scales or columns on or under which the costs of the several parts of the proceedings are to be taxed.

This language, upon the face of it, suggests that the county court judge has a discretionary power to direct that all the costs be taxed on one or other of the county court scales or columns. But it is said that para. (i) of the proviso modifies this, and that it limits the powers of the county court judge. This paragraph provides that the costs of the proceedings before remission are to be subject to the provisions of sect. 47 of the Act. It is accordingly necessary to refer to that section, which deals with the costs in the High Court of an action which could have been commenced in the county court, but is in fact both commenced and concluded in the High Court. The section compels the court, in such an action, where the amount recovered falls within the limits there specified, either to deprive the plaintiff of all costs or to allow him county court costs only, as the case may be. The upward limit, in the case of actions founded on tort (as was the present action), is £50. The rigour of this provision is modified in special cases by subsect. (3), and also by subsect. (4), which, in regard to the cases there mentioned, where the plaintiff recovers £20 or upwards—e.g., where the defendant has paid money into court, or where judgment has been obtained in default of appearance or defence —provides that the plaintiff shall, unless otherwise ordered, " be entitled to costs on such scale as may be prescribed by the rules of the Supreme Court."

It is said on behalf of the appellant that this section, by laying down precisely the cases in which the High Court is to allow no costs, or only county court costs, by implication means or recognises that in all other cases the High Court would be bound to allow costs on the High Court scale, and, accordingly, that, had the present proceedings not been remitted to the county court, the plaintiff, having recovered more than £50, would have been entitled to costs on the High Court scale. From this premise it is argued that, as the discretion given by sect. 73 is expressly made subject to the provisions of sect. 47, the only cases in which the county court judge can direct the costs before remission to be taxed on the county court scales are cases in which the High Court would have been bound to order them to be so taxed under sect. 47, in the case of a non-remitted action.

In our opinion, the primary effect of para. (i) of the proviso to sect. 73 is to limit the discretion of the county court judge by compelling him, in the cases mentioned in sect. 47, to award either no costs at all or only county court costs in respect of the proceedings before remission. But there is force in the argument that the proviso goes further than this. Sect. 47 fetters the discretion of the High Court judge as to costs in certain cases where the action could have been commenced in the county court. *Prima facie* a successful plaintiff in a High Court action is entitled to his costs on the High Court scale. Sect. 47 limits this *prima facie* right. It may well be said that, save in the cases specifically mentioned in the section, the High Court judge is not entitled to deprive the successful plaintiff of High Court costs merely on the ground that the action could have been commenced in the county court. To hold otherwise, it is said, would be to give to the High Court judge the right to penalise a successful plaintiff in cases other than those singled out by the legislature for such treatment. It is not necessary for us to decide whether or not this argument is well-founded. Even if it be conceded that the High Court judge has no power to deprive a successful plaintiff of High Court costs in a case not falling within the class mentioned in sect. 47 merely because the action could have been commenced in the county court, we are of opinion that he is entitled to award only county court costs in any case where, in his opinion, having regard to all the circumstances, the action ought to have been commenced in the county court, and that the county court judge has a like discretionary power with regard to the costs of a remitted action before remission. In the present case, there is no written record of the county court judge's reasons for his decision in the matter of costs. Had the matter stood there, we should have assumed that he exercised his discretion on correct principles, and had formed the opinion that the action ought to have been commenced in the county court. It would be for the appellant to satisfy us that the county court judge had exercised his discretion on a wrong principle, and this he has failed to do. There was again a conflict of recollection with regard to the reason given by the county court judge, the appellant's counsel thinking that he decided solely on the ground that the action could have been commenced in the county court, the respondent's counsel thinking that he held that the action ought to have been commenced in the county court. In the circumstances, we are not entitled to hold that the appellant has discharged the burden which lies upon him to satisfy us that the county court judge acted upon a wrong principle.

We must, in conclusion, refer to the case of *Jenkins & Co.* v. *Simon* (1), which was relied on by counsel for the appellant. That was a case which fell within the proviso to the County Courts Act, 1919, s. 11, which corresponds to sect. 47 (4) of the Act of 1934. That proviso said that in the cases mentioned the plaintiff " shall, unless otherwise ordered by the court or a judge, be entitled to costs on the High Court scale." The effect of the county court judge's order in that case was, as was said by SALTER, J., to nullify this provision. The present case does not fall within sect. 47 (4), and the decision in *Jenkins & Co.* v. *Simon* (1) is, in our opinion, not in point. The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors : *A. Wood & Co.*, agents for *D. Wood & Co.*, Birmingham (for the appellant) ; *Ward, Bowie & Co.*, agents for *Duggan & Elton*, Birmingham (for the respondents).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

TRUBYFIELD *v.* GREAT WESTERN RAILWAY CO.

[KING'S BENCH DIVISION (Greaves-Lord, J.), **December 2, 3, 1937.**]

Negligence—Personal injuries—Damages—Assessment—Shortened expectation of life—Injuries resulting in death to girl of 8 years of age.

A young girl of 8 years of age was killed in a street accident, and damages were claimed in respect of her loss of expectation of life :—

HELD : though, in the case of a very young child, some reduction of damages must be made, having regard to children's ailments, yet, in the case of one who has outlived such dangers, there should be no such reduction on account of the infancy. The question of the inability of the child to appreciate the loss of expectation of life is wholly immaterial. The damages were assessed at £1,500.

[**EDITORIAL NOTE.** Since the decision in *Rose* v. *Ford* (1), the assessment of damages for the loss of expectation of life has become a matter of importance and difficulty. The decision in *Rose* v. *Ford* (1) was that this head of damage had always been material in actions for personal injuries, but that it had received little attention in practice. The Court of Appeal in *Roach* v. *Yates* (2) considered in an exceptional case the application of the general principles laid down in *Rose* v. *Ford* (1), and in the present case we have the consideration of such application to the case of a child who has survived the period of childish ailments, but is yet quite young. In the consideration of this, the court would seem to have taken the figure which was considered satisfactory in the case of a young woman of 23 years of age (the age of the young woman who was the subject of the decision in *Rose* v. *Ford* (1)) and to have added something in respect of the difference of 15 years between the respective ages.

AS TO DAMAGES FOR PERSONAL INJURIES, see HALSBURY, Hailsham Edn., Vol. 23, pp. 724, 725, para. 1016 ; and FOR CASES, see DIGEST, Vol. 36, pp. 125, 126, Nos. 831-838.]

Cases referred to :

(1) *Rose* v. *Ford*, [1937] A.C. 826 ; [1937] 3 All E.R. 359 ; Digest Supp. ; 106 L.J.K.B. 576 ; 157 L.T. 174.

(2) *Roach* v. *Yates*, [1937] 3 All E.R. 442; Digest Supp.

(3) *Dransfield* v. *British Insulated Cables, Ltd.*, [1937] 4 All E.R. 382; Digest Supp.

ACTION for damages for personal injuries, including a claim under the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1.

In a street accident a young girl of 8 years of age was killed, and the question arose as to the assessment of damages in respect of her loss of expectation of life.

R. E. Manningham-Buller for the plaintiffs.

W. N. Stable, K.C., and *G. Bankes* for the defendants.

Stable, K.C.: The basis on which the damages should be assessed is compensation of the deceased. The court must consider two things, (*a*) the expectation of life, and (*b*) the person who has suffered the injury. A young child would appreciate the expectation of life much less than would a person of maturer years. A child of 8 years of age should receive less than a young woman of 23 should.

Manningham-Buller: As to damage, if this had been a jury case, and the jury knew that in a few days the child had died, they would have given very substantial damages. The measure of damage is the shortening of expectation of life in fact, not what was in the child's mind with regard to it. It is not right to say that a child of 8 years of age should receive less than an older person. [Counsel referred to *Roach* v. *Yates* (2).]

GREAVES-LORD, J. [after dealing with the question of liability]: The remaining item is how far weight must be given and damages assessed for the loss of expectation of life which this little girl has suffered, and which has to be assessed in her personal right, and with respect to her, just as though she were living, and bringing the action, and asking for it to be assessed. The period by which that has been shortened is the difference between the age at which she died and the normal span of life of a girl of the age of eight. But, although I have received considerable information as to the Registrar-General's tables on the normal span of life, I think that one would be completely mistaken if one were to regard them with any exactness at all, because, in my view, they do not seem to be compiled with a real appreciation of the ordinary incidence of life. They are compiled in an abstract way from averages, and do not, in my view, really reflect a true picture. But I suppose everyone has a sort of general notion of the likelihood of life, and I suppose everyone is a little inclined to look at the optimistic side. Therefore, with any calculation, one must give effect to the possibility that any view of the length of life as a whole will tend to be rather on the roseate side. What one really has to value, however, is the life as a whole, with all its various incidents, and apparently, taking the opinions of their Lordships in *Rose* v. *Ford* (1), that has to be taken and valued with certain very strict restrictions.

One cannot base it upon loss of earning capacity nor upon any calculation as to earning capacity. One is not allowed to base it upon the social position of the person whose life is shortened, because in respect of all those matters one is very definitely and carefully restricted by their Lordships. When one tries to get any guide, one has really only two passages in the report which are of any real guidance. LORD WRIGHT says, at p. 373:

> The jury should be directed that they are entitled to take it into consideration along with other relevant elements of damage, using their common sense to give what is fair and moderate, in view of all the uncertainties and contingencies of human life. Special cases may occur, such as that of an infant, or an imbecile, or an incurable invalid, or a person involved in hopeless difficulties.

I do not take that as meaning, and I see no justification for taking it as meaning, that each special case must necessarily be smaller in amount than those cases which are not special cases. Each case must be dealt with upon its own merits, and I can certainly well conceive that, in the special case of an imbecile, or in that of an incurable invalid, there may be then the elements which would tend to reduce the compensation or the damages below that which would normally be awarded in the case of a normal healthy person of full age. On the other hand, an infant may be regarded in many ways. With regard to a very young infant, one would realise that there was a question of probability which had to be taken very seriously into account, because a young infant has got to meet all the terrors of child life, children's ailments, and the like, and in fact has to face even the possibility, which the infant faces with only a child's ability, of such an accident as this. Therefore, in that case, in the case of a very young infant, it must be that the calculation of the exigencies and incidents of life would materially decrease the amount that would be given, whereas, in the case of an infant who has outlived the dangers of childish ailments, or has been tested by them and has come through the ordeal, it may very well be that that child's outlook has been clarified, and therefore it may look upon an entirely unclouded vista of life. On facts about which we know nothing except that they were assessing damages on this ground in the case of an apparently healthy young woman of twenty-three, the Court of Appeal apparently found, with the acceptance of the parties—both those who were concerned to depreciate, and those who were concerned to appreciate, the damages—that £1,000 in that case was right.

I have to deal with a difference of some 15 years. Those 15 years embody that portion of life which is thought by many, and said by many, to be the happiest portion of life. I fail to see why I should put the difference of 15 years wholly on the debit side, and I certainly decline to do it. I cannot imagine that the years of childhood and adolescence, growing into womanhood, are purely a debit. In my view, they are just as much entitled to be called a "good thing" as a life of full age is entitled to be called a "good thing," as, in my view, if I may say so with deference, they are called a "good thing" by LORD ROCHE in *Rose* v. *Ford* (1).

In the end, it comes to this. If I may follow such directions as are given, it means that one has to take into account and arrive at some assessment of what life is worth to a person with the normal expectation—who may pass through the normal vicissitudes of life, with all its joys, with all its sorrows, with its hardships, with its various burdens, with its duties—coupled with the fact that the person has to provide for his own life and may have burdens upon it: it has to be taken into account with all its various attributes, whether they be of enjoyment or of work or of the fulfilment of duties, as is put in the decision in *Rose* v. *Ford* (1). What is life going to be worth to a healthy young woman—as one hopes, and one has no reason to doubt, this young child might have become—earning her own living, with dependent parents to whom she is discharging her duty, and, as LORD SANDS and LORD ROCHE say, with some prospects of marriage? In other words, what is life going to be worth to a young woman with the prospect of the fulfilment of the natural expectation of a natural life? One has to be very careful how one takes this. After all, life is uncertain; there are all sorts of things to be taken into account.

As I have said, there has been, so far as is known, one assessment, and that an assessment of £1,000 in one case. Since then, the Court of Appeal has considered other matters, and, among other things, has laid down that one of the elements not to be taken into account is the degree to which the person in respect of whose life the damages are assessed would appreciate the damages assessed. In other words, the question of the appreciation of that person is wholly immaterial. That, at any rate, does appear from the decision in *Roach* v. *Yates* (2).

So the question here is the value of life, considered as a good thing, and trying to assess the debit and credit as best one can, always remembering that one cannot be exact; that one has not to take into consideration any such question as what a man would take for his life, or anything of that sort, and that one must be moderate as between man and man. Well, I have to take the responsibility of it. There are others to correct me if I have wrongly interpreted the principles on which it must be assessed, and I sincerely hope that an opportunity will be taken to test this, because it is a very important matter, from the point of view of the public as a whole. Giving the best consideration I can to the various elements, and realising that nothing can be ideal, that nothing, as has been said very definitely and very clearly by the highest tribunal in the country, can be really adequate in such a case, though that is no excuse for not assessing the amount, I think the smallest amount at which this could be assessed would be £1,500.

Solicitors: *Barlow, Lyde & Gilbert*, agents for *Ivens, Thompson & Green*, Cheltenham (for the plaintiffs); *A. G. Hubbard* (for the defendants).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

GULBENKIAN *v.* GULBENKIAN.

[Probate, Divorce and Admiralty Division (Langton, J.), **November 11, 12, December 6, 1937.**]

Divorce—Domicil—Abandonment of domicil of origin—Acquiring fresh domicil—" Intention of permanent or indefinite residence "—Onus of proof—Evidence—Declaration of parent for obtaining naturalisation—Admissibility.

The respondent in a divorce suit was an Armenian by birth, a subject of the Ottoman Empire, but left Turkey for England at the age of 3 months. In 1902, his father, in an application for naturalisation, stated in a statutory declaration that he intended to reside permanently in the United Kingdom. The father, who was still alive, and living in Paris, was not called to give evidence, having refused to have anything to do with the divorce proceedings. The respondent received an English education from 1906 onwards, and led a life which alternated between London and places of interest and amusement on the continent. He had become a naturalised Persian subject and a commercial attaché to the Iranian Legation in London. It was found as a fact that his father had not formed any intention to reside permanently in Paris before the respondent came of age. The respondent had attained 40 years of age, living for the most part in England, a member of one English social club and of several English sporting clubs, but wholly dependent upon his father. He had on one occasion successfully resisted the efforts of his father to make him reside in Paris :—

Held : (i) the evidence established that the respondent had acquired a domicil of choice in England.

(ii) the respondent's father had acquired a domicil of choice in England which he had never abandoned until after his son had attained his majority. The last domicil which the respondent had received as a dependent person not having been changed by his own act, his domicil was clearly English.

(iii) the statutory declaration of 1902 was admissible in evidence to show that the respondent's father then intended to acquire an English domicil.

[**EDITORIAL NOTE.** The burden cast upon those who attempt to prove that a domicil of origin has been superseded by a domicil of choice is a very heavy one, but it is here held to be discharged ; the conclusion of the judge upon the evidence being that the person in question had not the slightest intention of living anywhere but in the country of the suggested domicil. It was proved that by sheer force of circumstances that person might be compelled to live elsewhere, but this did not exclude a finding of a domicil of choice. Declarations made on an application for naturalisation were admitted in evidence, as evidence of the intentions of the party making them, though he was still alive.

As to Evidence of Change of Domicil, see HALSBURY, Hailsham Edn., Vol. 6, pp. 203-205, paras, 246, 247 ; and for Cases, see DIGEST, Vol. 11, pp. 317-319, Nos. 67-79.]

Cases referred to :

(1) *Winans* v. *A.-G.*, [1904] A.C. 287 ; 11 Digest 312, *38* ; 73 L.J.K.B. 613 ; 90 L.T. 721 ; *revsg.* S.C. (1901), 85 L.T. 508.

(2) *Douglas* v. *Douglas, Douglas* v. *Webster* (1871), L.R. 12 Eq. 617 ; 11 Digest 315, *54* ; 41 L.J. Ch. 74 ; 25 L.T. 530.

(3) *Udny* v. *Udny* (1869), L.R. 1 Sc. & Div. 441 ; 11 Digest 309, *19*.

(4) *King* v. *Foxwell* (1876), 3 Ch. D. 518 ; 11 Digest 313, *45* ; 45 L.J. Ch. 693.

Trial of an issue as to domicil arising out of a petition for dissolution of marriage brought by Mrs. Dore Gulbenkian against her husband, Mr. Nubar Sarkis Gulbenkian. Mr. Gulbenkian, the plaintiff to the issue, contended that, though resident in England, he had not an English domicil, as he had been born in Turkey, an Armenian subject of the Ottoman Empire, with a Turkish domicil of origin, and had never decided to live permanently in England.

Sir Patrick Hastings, K.C., *R. F. Bayford, K.C.*, and *H. W. Barnard* for the plaintiff.

A. Melford Stevenson and *Earl of Drogheda* for the defendant.

Langton, J.: On Oct. 23, 1936, an order was made by the registrar that an issue as to domicil be tried between the parties to this case. He further directed that the respondent in the case, Mr. Nubar Sarkis Gulbenkian, should be the plaintiff, and that the petitioner should be the defendant, in the issue, and that the evidence should be given orally. Upon an appeal from that order, Sir Boyd Merriman, P., directed as follows:

> I do make no order except that each side do within 21 days exchange with the other side independently particulars of the allegations on which the affirmation and denial respectively of domicil is based.

Particulars were exchanged between the parties, and the issue before me is as to whether the plaintiff to the issue was domiciled in England at the date of the institution of the suit, Aug. 14, 1936. The particulars delivered under the order of Nov. 2, 1936, recited various facts upon which the parties respectively relied. During the hearing before me, two aspects of the matter in issue between the parties assumed importance, and Mr. Stevenson, on behalf of the defendant to the issue, at my invitation handed in an amendment in support of the defendant's case. In the course of his final address, Sir Patrick Hastings defined the two points for my consideration in the following words:

> (1) Had Mr. Gulbenkian senior at the date of Nubar's majority, acquired an English domicil; and (2) whether in any event Nubar has acquired a domicil of choice in England.

I cannot improve upon this succinct definition of the points, and would add in amplification only that the Mr. Gulbenkian senior here referred to is the father of Mr. Nubar Gulbenkian, the plaintiff in the issue, and that I have also considered the question of whether Mr. Gulbenkian senior, if he had acquired an English domicil at all, had changed it for a French domicil of choice before his son attained his majority.

As to the greater number of the facts in this matter, there was no contest at all. It was agreed that Mr. C. S. Gulbenkian, the father of Mr. Nubar Gulbenkian, was an Armenian by birth, and, as such, a subject of the Ottoman Empire. On June 2, 1896, Mr. Nubar Gulbenkian was born, at Kadi Keui, near Constantinople, and three months later Mr. C. S. Gulbenkian left Turkey for England. It is apparently a matter of family legend that Nubar Gulbenkian, then aged three months, made a portion of the journey, presumably the earlier part, in a bag or portmanteau which formed part of the family belongings. It is not, I think, necessary to inquire into the truth of this fragment of family history, since it is not the case of either party to the issue that this short-lived sojourn constituted a domicil of choice. Returning, however, to the solid region of fact, it is agreed that thenceforward, from the year 1896, Mr. C. S. Gulbenkian and his family took up residence in London. In 1898, a house was bought in Hyde Park Gardens, and this house formed a centre for the family and a home for Mr. Nubar Gulbenkian during his early youth. In 1902, Mr. C. S. Gulbenkian took steps to obtain British naturalisation, and on Dec. 1, 1902, he took an oath of allegiance to the British Crown. In order to acquire naturalisation under the Act of 1870, Mr. C. S. Gulbenkian was obliged to address a memorial to the Secretary of State to the Home Department, and to make a solemn declaration as directed by the statute. In para. 6 of the memorial, Mr. C. S. Gulbenkian states that he has no intention of permanently leaving the United Kingdom, and in para. 7 he goes on to say that he has intentions of residing permanently in the United Kingdom. In para. 6 of the statutory declaration, he repeats that he intends to reside permanently in the United Kingdom of Great Britain and Ireland. He gives as his reason for such intention the fact that he has become attached to the United Kingdom and its Government, and states that he has the intention of carrying on his business as a merchant there, and living permanently there, and is desirous of obtaining the rights and capacities of a natural-born British subject. From the wording of the Naturalisation Act, 1870, s. 7, it does not appear necessary for an alien seeking naturalisation to aver that he intends to reside permanently in the United Kingdom, but it is certainly necessary to declare that he intends to reside there. It would be unwise, as it is probably unnecessary, to speculate upon the reasons for the emphasis employed by Mr. C. S. Gulbenkian, but it is worthy of note that the emphasis is there. Sir Patrick Hastings objected very strongly throughout to the admission of these documents in evidence. He contended that they were irrelevant, and not the best evidence concerning the intentions of Mr. C. S. Gulbenkian, who is alive and vigorous and living in Paris. He argued with great force that the statements of the father could not be used as admissions against his son in these proceedings, and that the documents were thus in several ways objectionable. Not without some doubt and hesitation, I ruled that they were admissible in the present instance, as being relevant to, and the best evidence in support of, a fact upon which the plaintiff relied—namely, the intentions of Mr. C. S. Gulbenkian in 1902. As to the contention that the defendant could, if she had so desired, have called Mr. C. S. Gulbenkian in person to give evidence, I had already been informed by the plaintiff, Nubar Gulbenkian, that his father had refused to have anything to do with these proceedings, and as he is now, for all practical purposes, permanently resident in Paris, it would be quite impossible for either party to compel his attendance in the witness-box.

Pursuing now the history of the Gulbenkian family after their establishment in England, it was not disputed that the plaintiff Nubar Gulbenkian received an English education, at an English preparatory
A school, at Harrow, and at Cambridge, with the additional advantage of an interlude at the University of Bonn between his time at Harrow and Cambridge. From 1906 onwards, Mr. C. S. Gulbenkian and his wife led a life which alternated between London and Paris, with frequent sojourns in the south of France, Deauville, Ostend, and other places
B of interest and amusement upon the continent. Their son Nubar divided his holidays between these various places, and no doubt acquired in consequence what may be called a cosmopolitan outlook upon life and affairs. Shortly after the outbreak of War in 1914, Mr. Nubar Gulbenkian offered his services to the British War Office, to act as an
C interpreter. His services were declined, on the ground that he was not a British subject. The evidence before me did not show how closely the questions of domicil or nationality were then inquired into, and it would probably be unsafe to draw any inferences from, or to base any conclusion upon, the decision of a war department in the first fever
D of hostilities. The plaintiff produced before me a bewildering series of passports, registration certificates, and *laisser passers* which he had possessed and utilised upon his travels, and established beyond dispute that he is now a naturalised Persian subject, and enjoys the position of honorary commercial attaché to the Iranian Legation in London.
E It appeared from the evidence that the Gulbenkian family have the idiosyncrasy of forming a limited liability company upon any occasion upon which they propose to acquire real estate. Thus there has recently been formed in this country a company bearing the romantic name of L'Aiglon Estates, Ltd., for the sole purpose of acquiring either the
F lease or the freehold of a house in Mayfair, which was destined for the use of some member of the family. It was suggested, in cross-examination of Mr. Nubar Gulbenkian, that this family habit and his own professed obscurity of mind as to his domicil, together with the acquisition of a Persian nationality, were all steps adopted and adapted to secure
G the family and himself from the unwelcome attention of the revenue authorities. I have not thought it necessary to pursue this point very far, since I am concerned here with the question of domicil only, and Mr. Nubar Gulbenkian did not for a moment suggest that his enthusiasm for, or his new-found allegiance to, Persia was likely to lead him to adopt
H a residence in an Asiatic clime. Passing now from the uncontroverted facts to matters which were not altogether agreed between the parties, it was established to my satisfaction that Mr. C. S. Gulbenkian has, as his son said, of late years come to live almost entirely in Paris. I do not believe that there is any real chance that Mr. C. S. Gulbenkian will leave his immensely luxurious house in Paris and go back to the

East, as his son at one time in his evidence indicated as possible. I believe that from 1919 onwards he has been living more and more in Paris, and that he has resided there almost exclusively since 1926. I cannot, however, find anything in the evidence to justify the conclusion that he had formed any intention to reside permanently in Paris, or to acquire a French domicil, before the year 1917, when his son Nubar A
came of age.

It is necessary next to consider the somewhat unusual relations existing between the father and the son in this case. Taking first the question of mere residence, without attaching to it, for the moment, any special significance from the point of view of domicil, it is probably B
true to say that Mr. C. S. Gulbenkian is resident principally in Paris, and that his son Nubar is resident principally in England. As to the latter point, the evidence is quite overwhelming. Mr. Nubar Gulbenkian was, with one small exception, educated throughout in England. His friends are mostly English, his pursuits are English, and he is continually C
renting English houses or flats. He is a member of at least one English social club, and a member of more than one English sporting club. He is the representative of his father in respect of considerable commercial interests in London, and he is the commercial representative, and the only commercial representative, of the Iranian Legation at the Court D
of St. James's. In argument, Sir Patrick Hastings frankly conceded what his client had already admitted in the witness-box—that his residence of preference had always been England, and that that preference had not changed to-day. So far as worldly possessions are concerned, it would appear that Mr. C. S. Gulbenkian is a man of great, one might E
almost say of gigantic, wealth. Mr. Nubar Gulbenkian told me, not in any boasting spirit, and not indeed without some considerable persuasion on the part of his own counsel, Sir Patrick Hastings, that his father possessed a residence in Paris which contained some five or six drawing-rooms and a picture gallery, and in which twenty-four indoor servants F
were engaged. Notwithstanding this immense fortune, the son Nubar has been kept entirely dependent upon his father. The son is now a man of over 40 years of age, but he told me, and I see no reason to doubt his word in the matter, that he is in reality dependent upon his father for every penny of his income. Moreover, he averred, and G
his wife, Mrs. Gulbenkian, agreed, that Mr. C. S. Gulbenkian is a man of autocratic habit and disposition.

At a time which was fixed as nearly as possible by Mr. Nubar Gulbenkian as 10 years ago, Mr. C. S. Gulbenkian purchased a house in the Rue Menier in Paris for the sum of about 800,000 francs. It will be remembered H
that it was about this time that Mr. C. S. Gulbenkian had begun to take up a permanent residence in Paris, and I have no doubt at all that he bought this house with the express intention of getting his son Nubar to live in it. Upon this portion of his evidence Mr. Nubar Gulbenkian struck me as a little less than candid. I do not think that

it is accurate to say, as Mr. Nubar Gulbenkian at first attempted to contend, that the house was bought with the object of getting either the daughter and her husband (Mr. and Mrs. Essayan) or the son Nubar to live in it. The real truth, as Mr. Nubar Gulbenkian really admitted under pressure, was that the house was bought with the intention of A getting him to Paris, and, after a considerable battle between father and son, the son persuaded the father to accept his sister and brother-in-law as tenants in his stead. The defendant, Mrs. Nubar Gulbenkian, threw further light upon this incident, or rather upon the significance of this incident, when she said that, autocratic as the elder Gulbenkian B might be, Nubar Gulbenkian by no means always did as he was told. Throughout the greater part of his evidence, Mr. Nubar Gulbenkian was frank and ready in his replies, and his hesitation upon this point of the house in the Rue Menier was, for that very reason, all the more marked. My acquaintance with Mr. Nubar Gulbenkian is limited to C a period of two hours sojourn in the witness-box, but I have no doubt at all that he is a most intelligent and a most determined person, and that only the most compelling pressure would drive him to take a course which he was unwilling to take. It may be that in the power of the purse Mr. C. S. Gulbenkian still retains the last word over his son, but I D doubt very considerably whether that last word ever has been or ever will be spoken, and whether Mr. Nubar Gulbenkian will not always be able to find a way either to allay or to circumvent parental opposition before resort is taken to extreme measures.

Some excellent but very far-reaching evidence was given by Dr. E Mennell, a distinguished Harley Street physician, which enlivened rather than enlightened the proceedings by illustrating the preoccupation of Mr. C. S. Gulbenkian with the subject of his own health. Similarly the evidence of Mrs. Dore Gulbenkian, the defendant to the issue, did not greatly advance my understanding of the matters in dispute, F save in the respect I have already noted. As for the plaintiff, Mr. Nubar Gulbenkian, he gave his evidence with the utmost good temper throughout. He is much too wise a person to tell any foolish falsehoods, but he did not strike me as a person of puritan scruple, and I do not think that he would hesitate, or has hesitated in this case, to give himself G the benefit of the doubt upon any topic as to which dubiety existed. In argument, when the evidence had been concluded, Mr. Stevenson called my attention to the definition of domicil of choice contained in DICEY'S CONFLICT OF LAWS, 5th Edn., 1932, p. 83, where r. 7 is set out in these terms :

> H Every independent person can acquire a domicil of choice, by the combination of residence (*factum*) and intention of permanent or indefinite residence (*animus manendi*), but not otherwise.

He also cited r. 9, at p. 99, and r. 11, at p. 111 :

> 9. The domicil of every dependent person is the same as, and changes (if at all) with, the domicil of the person on whom he is, as regards his domicil, legally dependent.

11. The last domicil which a person receives while he is a dependent person continues, on his becoming an independent person, unchanged until it is changed by his own act. (1) A person on attaining his majority retains the last domicil which he had during his minority until he changes it.

Basing his argument upon these rules, he contended, in the first place, that the evidence established that Mr. Nubar Gulbenkian had acquired a domicil of choice within the meaning of r. 7. Secondly, and alternatively, he contended that Mr. C. S. Gulbenkian had, in or about the year 1902, acquired an English domicil of choice which he had never abandoned until after the majority of his son, in June, 1917. In consequence, the last domicil which the plaintiff had received as a dependent person continued until he had changed it by his own act, and, since he had done nothing to change it at all, his domicil was plainly English.

The answer made by Sir Patrick Hastings to the first of these points was to challenge the accuracy of the word " indefinite " in r. 7, and to cite the high and unquestionable authority of the EARL OF HALSBURY, L.C., in *Winans* v. *A.-G.* (1), at p. 288, to show that the rule was unjustifiably elastic in its wording. Sir Patrick's argument upon this point was, as usual, a model of clearness and brevity. He took the following sentence from the opinion of the EARL OF HALSBURY, at p. 288 :

> Now the law is plain, that where a domicil of origin is proved it lies upon the person who asserts a change of domicil to establish it, and it is necessary to prove that the person who is alleged to have changed his domicil had a fixed and determined purpose to make the place of his new domicil his permanent home.

Sir Patrick added to that an equally plain question and answer addressed by himself to the plaintiff, and answered by the plaintiff. The question was : " Have you ever had any intention of making your permanent home in England ? " and the answer was : " I never had any intention to make my permanent home anywhere yet." He might have added, in supplement to this argument, that, at a later stage, in answer to me, when discussing the possibility of his father's return to the East, Mr. Nubar Gulbenkian stated as follows :

> My intention with regard to my permanent home, in all fairness—I am trying to put it impartially—really depends on what my father decides to do. I cannot in all fairness say I have made up my mind to settle down and have a permanent home anywhere at present.

This evidence, said Sir Patrick, if believed, disposed of the whole question of domicil of choice beyond argument. The court must either believe or disbelieve the plaintiff, but, if he were believed, then there could be attributed to him no fixed and determined purpose to make the place of his new domicil his permanent home. Argument by dichotomy, if I may so term it, is a vivid and arresting method. It is a legitimate weapon of advocacy, and, in the hands of a master, such as Sir Patrick Hastings, it is no doubt an adornment to that art. But to my mind it always prompts the reflection whether the subject so neatly and truly divided really contains the whole of the relevant matter. It is perfectly true to say that the court must either believe or disbelieve Mr. Nubar Gulbenkian, but the question upon which his credibility is here balanced is quite a difficult question for an honest man to answer accurately, and much might depend upon the degree of scruple of the witness answering it. It seems, moreover, possible to me to read the evidence quoted as honest without giving to it all the meaning which is attributed to it by Sir Patrick. The speech made by the Earl of Halsbury in *Winans* v. *A.-G.* (1) was followed by a speech made in hearty concurrence by Lord Macnaghten. It is interesting, but not, I think, relevant, to remember that the third speech in that case, that of Lord Lindley, was in dissent. It is more to the point that the final test applied by Lord Macnaghten, at p. 298, is drawn from the judgment of Wickens, V.-C., in *Douglas* v. *Douglas* (2), at p. 645. In that case, the period of residence in the new country—England—had been comparatively short, whereas in *Winans*' case (1) the period had been very long. Wickens, V.-C., expresses himself in these words, at p. 645:

> It may, perhaps, be added, that to prove such an intention as is necessary to establish a change of domicil, and in the absence of evidence that the intention actually existed (which can be shown by express declaration, and in no other way) the evidence must lead to the inference that if the question had been formally submitted to the person whose domicil is in question, he would have expressed his wish in favour of a change. Possibly where the actual residence in the acquired domicil has been very long, an unconscious change of mind may be inferred, though it may be doubtful whether it would have been declared or admitted if the question had been actually raised. Such unconscious changes of opinion on the most important subjects happen not unfrequently in such a space of time as the 32 years residence in England, which occurred in *Udny* v. *Udny* (3). But, in cases not involving a very long time, I apprehend that, in order to establish a change of domicil, it must be shown that the intention required actually existed, or made reasonably certain that it would have been formed or expressed if the question had arisen in a form requiring a deliberate or solemn determination. What, therefore, has to be here considered is whether the testator, William Douglas, ever actually declared a final and deliberate intention of settling in England, or whether his conduct and declarations lead to the belief that he would have declared such an intention if the necessity of making his election between the countries had arisen.

Lord Macnaghten in *Winans*' case (1), at p. 298, applies the test here provided by Wickens, V.-C.:

> . . . if the question had arisen in a form requiring a deliberate or solemn determination.

Applying that passage to the present case, I think that it is quite possible, and indeed probable, that the plaintiff can say with truth that he has never formed any intention of making a permanent home anywhere yet, because he has never been confronted with any necessity to crystallise his general views upon the matter into a set and fixed decision. At the same time, I have no doubt in my own mind that he has an overwhelming preference for England, and that, unless he was confronted with the certainty that by so doing he would lose his inheritance from his father, he would, if faced with the necessity of making a deliberate determination, declare for an English domicil. Upon the evidence before me, I do not think that there is in reality any kind of probability that Mr. C. S. Gulbenkian will confront his only son with such a disagreeable alternative. I am accordingly of opinion that, in the years which have gone by, and equally to-day, it is, in the words of Wickens, V.-C., "reasonably certain" what Mr. Nubar Gulbenkian "would have done or would do if the question had arisen or now arose in a form requiring a deliberate or solemn determination." Another case which throws much light upon the present issue, and also bears the high authority of the House of Lords, is that of *Udny* v. *Udny* (3). For example, Lord Hatherley, L.C., seeking to find the real intention of Colonel Udny, uses the following language, at p. 447:

> but I think his possible intention to leave Scotland (if molested by creditors) in no way disproves the existence of a resolution to remain, as he did, in that country (if allowed to do so) as his chosen and settled abode.

Applying the principle enshrined in these words to the present case, the mere fact, that the plaintiff might be forced by his father either by a parental order before death or by a provision in the father's will to change his resolution, does not really militate against that resolution of the plaintiff—as evidenced by his continued life in this country and his determined resistance to his father's will in the matter of residing in the Rue Menier in Paris—to make his permanent home in England.

No one could hold the judgments of the Earl of Halsbury in higher respect than I do, and it would be idle to suggest that, speaking, as he did, in the year 1904, with all the authority of a Lord Chancellor of long service in that most distinguished office, he was employing loose and unconsidered phraseology. In my judgment, however, it is both right and fair to read the expressions "fixed and determined," used by the Lord Chancellor, in the light of the earlier cases, which are later recited with warm approval in the opinion of Lord Macnaghten in the same case. I have not lost sight of the fact that, as both the Earl of Halsbury and Lord Macnaghten insist, the burden cast upon those who seek to aver that the domicil of origin has been superseded by a domicil of choice is exceedingly heavy. Heavy as it is, in my view the defendant here has discharged that burden, by proving to my satisfaction that the plaintiff really intends to remain in England, and will always exercise his option in that direction, unless forced to a reluctant departure by circumstances beyond his control. I entirely agree with Sir Patrick Hastings that this case cannot be decided by any loose determination that, upon the evidence as a whole, the plaintiff prefers England to any other country. It is necessary to go far further than that. I am finding expressly that Mr. Nubar Gulbenkian has an English domicil of choice, because I do not believe that he has the slightest intention of willingly living anywhere else.

As to Sir Patrick's quarrel with Mr. Dicey upon the use of the word "indefinite" in r. 7, there is, to my mind, the high authority of Sir George Jessel, M.R., in *King* v. *Foxwell* (4) to warrant the wording of the rule. Sir George Jessel, M.R., there said, at p. 520:

> What is domicil? I have had before me a great number of authorities, and the conclusion I draw is this, that in order that a man may change his domicil of origin,

> he must choose a new domicil—the word "choose" indicates that the act is voluntary on his part—he must choose a new domicil by fixing his sole or principal residence in a new country (that is, a country which is not his country of origin), with the intention of residing there for a period not limited as to time.

The last words are, to my mind, the warrant for Mr. Dicey's phrase, and give a certain shading to the expression "permanent," without A rendering that word inapplicable in the circumstances. In other words, the intention must be a present intention to reside permanently, but it does not mean that such intention must necessarily be irrevocable. It must be an intention unlimited in period, but not irrevocable in character. The opinion of LORD WESTBURY in *Udny* v. *Udny* (3) B is a veritable treatise upon this most difficult question. He deals in detail and with great lucidity with the circumstances which create or constitute a domicil of choice, and concludes his review of these circumstances with the following sentence, at p. 458:

> C It is true that residence originally temporary, or intended for a limited period, may afterwards become general and unlimited, and in such a case so soon as the change of purpose, or *animus manendi* can be inferred, the fact of domicil is established.

Prominence is given throughout to the necessity of a free choice, and the fact that the residence has not been selected for a limited period D or for a particular purpose, but, as I read it, a domicil of choice can be inferred notwithstanding the fact that the individual to whom it is ascribed is not conscious of having taken any deliberate decision at any given or particular moment.

The second aspect of this matter depends, at the outset, upon the E validity of my ruling as to the admissibility in these proceedings of the memorial and declaration of Mr. C. S. Gulbenkian in 1902. If I was wrong in admitting these documents in evidence, the foundation of the second point made by Mr. Stevenson is destroyed. If, on the other hand, I was right to admit them, it seems to me that there is a sufficiently F strong case upon this line to establish the fact that Mr. C. S. Gulbenkian changed his domicil of origin in 1902 and then acquired a domicil of choice in England. I do not agree with the point, made here by Sir Patrick Hastings, that a declaration made almost in a set form prescribed by statute provides no real evidence of the declarant's intention. G When the legislature provided that aliens were not to have the advantages of British nationality save on certain set terms, it seems probable to me that the terms prescribed were very seriously canvassed, and were intended to be most strictly observed. It appears in no way unreasonable that Parliament should have intended that no man should have the pro- H tection of British arms unless he on his part had formed the clear and serious intention of residing under British rule. When, therefore, Mr. C. S. Gulbenkian expressed upon oath that he intended to reside permanently in Great Britain, I can see no reason why that declaration should not be taken at its full value as a desire to acquire a domicil of choice in this country. Nor did Mr. C. S. Gulbenkian's subsequent actions do anything to belie this inference from his solemn declaration. It is true that, even before the War, he had been wont to spend a large portion of his time out of England, and that, after the War, he came to live more and more in Paris, where he now seems to have his principal home. But the fact that, at a considerably later period, he may have acquired a fresh domicil of choice in France does not militate, in my view, against a natural, and even necessary, inference that in 1902 he acquired an English domicil. Mr. Nubar Gulbenkian came of age on June 12, 1917, and at that time there is no evidence at all before me that his father had taken any steps from which it could be inferred that he had then changed his English domicil to a domicil in France. In 1917, therefore, when he came of age, Mr. Nubar Gulbenkian, upon this view of the circumstances, had a domicil in England, acquired during his minority through his father. The burden would then be upon those seeking to show that he had acquired a fresh domicil of choice after reaching his majority. We have already seen how heavy that burden is. The evidence before me, so far from establishing any domicil of choice elsewhere, is, as I have already pointed out, in my view strong enough to show that the plaintiff has actually acquired an English domicil.

It is, of course, sufficient for the defendant's purpose if she can succeed upon either of the two points before me. Either of them is enough to determine the issue in her favour. For the reasons I have given, both contentions are, to my thinking, sound, although I speak with some hesitation concerning the second. It is pleasant to reflect that, if my determination of the matter be correct, and if the plaintiff be genuine in his expressed desire to have this knotty point resolved, I have succeeded in giving to a gentleman to whom Sir Patrick Hastings referred as a "wandering Armenian" a home in the country which he most admires.

Judgment for the defendant with costs.

Solicitors: *Charles Russell & Co.* (for the plaintiff); *Gordon, Dadds & Co.* (for the defendant).

[*Reported by* J. F. Compton Miller, Esq., *Barrister-at-Law.*]

PETERS *v.* GENERAL ACCIDENT & LIFE ASSURANCE CORPN., LTD.

[King's Bench Division (Goddard, J.), **December 1, 1937.**]

Insurance—Motor car insurance—Purported assignment of policy by vendor of car—Policy handed to purchaser—Whether person injured by purchaser can recover from insurers.

The vendor of a motor car insured by the defendants handed over the insurance policy with the car to the purchaser. The policy contained the usual clause extending the cover to any person driving with the consent or permission of the insured. The plaintiff, who had been injured by the car after the sale had been completed, obtained a judgment against the purchaser, and in the present action sought to recover the damages he had been awarded from the present defendants under the provisions of the Road Traffic Act, 1934, s. 10 :—

HELD : (i) when the vendor sold the car, the insurance policy automatically lapsed.

(ii) at the time of the accident, the purchaser could not be said to be driving the car by the order or with the permission of the vendor, as the car was then the purchaser's own property.

A (iii) the insured is not entitled to assign his policy to a third party. An insurance policy is a contract of personal indemnity, and the insurers cannot be compelled to accept responsibility in respect of a third party who may be quite unknown to them.

[EDITORIAL NOTE. An attempt was made in the present case to show that B the handing over of the policy on the sale of a car was in law an assignment of the policy. This contention was rejected upon the ground that the insurers relied upon the history of the driver. As an alternative it was sought to rely upon the clause in the policy allowing the car to be driven by any person with the permission of the insured, but the judge took the view that the insurance had already lapsed.

AS TO DUTY OF INSURERS TO SATISFY JUDGMENTS, see HALSBURY, Hailsham C Edn., Vol. 18, pp. 563-565, paras. 913, 914 ; and FOR CASES, see DIGEST, Supp., Insurance, Nos. 3217 *ee*, 3217 *ff*.]

Cases referred to :

(1) *Rogerson* v. *Scottish Automobile & General Insurance Co., Ltd.* (1931), 146 L.T. 26 ; Digest Supp.

D (2) *Tattersall* v. *Drysdale*, [1935] 2 K.B. 174 ; Digest Supp. ; 104 L.J.K.B. 511 ; 153 L.T. 75.

(3) *Powles* v. *Innes* (1843), 11 M. & W. 10 ; 29 Digest 90, *484* ; 12 L.J.Ex. 163.

(4) *North of England Oil-Cake Co.* v. *Archangel Insurance Co.* (1875), L.R. 10 Q.B. 249 ; 29 Digest 92, *495* ; 44 L.J.Q.B. 121 ; 32 L.T. 561.

(5) *Rayner* v. *Preston* (1881), 18 Ch.D. 1 ; 29 Digest 308, *2546* ; 50 L.J.Ch. 472 ; 44 L.T. 787.

E

ACTION upon an insurance policy brought under the provisions of the Road Traffic Act, 1934, s. 10, to recover the amount of a judgment in respect of personal injuries from the insurance company.

A. S. Comyns Carr, K.C., and *Alban Gordon* for the plaintiff.

F *H. D. Samuels, K.C.*, and *Felix Denny* for the defendants.

Comyns Carr, K.C. : The policy is not an insurance of the car, but of various persons. The Road Traffic Act, 1934, s. 10, enables any person who has obtained judgment against any person insured by the policy to bring an action against the insurance company. Pope was G a person insured by the policy, as he was driving with the consent of the owner. Under sect. 10 (4), the insurers may be liable beyond the amount insured, and it is no answer to this claim that it goes beyond what is covered by the policy. Upon an assignment of the subject-matter of the policy, there is an implied agreement that the policy shall be kept H alive for the benefit of the unpaid seller. The law of third party insurance, being new law, should be developed on the same lines, as far as possible, as marine and fire insurance has been in the past. [Counsel referred to : *Tattersall* v. *Drysdale* (2), *Rogerson* v. *Scottish Automobile and General Insurance Co., Ltd.* (1), *Powles* v. *Innes* (3), *North of England Oil-Cake Co.* v. *Archangel Insurance Co.* (4), and *Rayner* v. *Preston* (5).]

Samuels, K.C.: The question here is purely one of fact. The seller handed to the purchaser a proposal form for his use, and it is clear that there was no intention of keeping the policy alive for the benefit of the purchaser. Motor insurance is a purely personal matter, and such policies are incapable of assignment without the concurrence of the insurers. A

GODDARD, J.: This is an action brought by Mr. John Peters under the provisions of the Road Traffic Act, 1934, s. 10. He alleges that, he being a person who had recovered judgment against one Christopher Pope for the sum of £387 7*s.* 8*d.* in respect of personal injuries suffered by him (he being injured by a motor car driven by Pope), and also £117 B costs, he has a right to recover his damages against the General Accident Fire and Life Assurance Corporation. He contends that he is entitled to the benefit of a policy which had been issued by the company in respect of the motor van which knocked him down, the van at the time being driven and owned by Christopher Pope. The case raises a question C which is, if the law is as I think it is, of vast importance to insurance companies, because the law must be the same, whatever are the particular circumstances with regard to the case. If it be the fact that a company can be made liable when a car has been driven in the circumstances in which this car was being driven—that is to say, after a D sale to a person of whom they had never heard—it would be rather a serious thing for companies, because one of the things that insurance companies, I understand, still take into account, or profess to take into account, is the history of the driver with regard to accidents, and so forth. It is perfectly true, and, I daresay it is inevitable, that they E also provide in their policies, where once they insure A. B., that they extend the insurance to any other person who may be driving the insured car with the consent or by the permission of A. B., and thereby, of course, they are exposing themselves to the risk that A. B. may entrust his car to a very reckless person. I suppose that in practice it works out all F right, because the majority of motor car owners, I think, have some pride in their cars, and do not want them smashed up, and so they will exercise reasonable care as to deciding to whom they will lend their cars. But it is perfectly true that motor insurers do give this wide extension clause, which puts it into the power of the insured person to G allow any person whatever to drive his car, provided he holds a licence, and if there is an accident the insurance company will be liable, even though the person may have a very bad driving record. It would be a still more serious thing if it could be said, as indeed it is said in this case, that, by an assignment to take place between the owner of the H car who is insured and somebody to whom he is going to sell his car, the buyer of the car can be thrust upon the insurance company as the assured, although they have no say in the matter whatever, and no opportunity then to refuse to insure him, because, as I understand the argument, the way it has been pressed on me—and, indeed, I think

Mr. Comyns Carr must go so far—is that this new assured would be put upon the insurance company, although they had never heard of him and never heard of the transaction until after some serious accident had taken place.

The facts of this case are these. The car in question is an Austin seven van, and it was the property of a Mr. Coomber. Mr. Coomber was insured under a policy which is admitted to have been in force on the day of the accident, which was Sept. 8, 1935. The premium had been paid up to Sept. 30, 1935. In July, 1935—that is to say, two months before the accident took place—Mr. Coomber sold his car to a Mr. Pope, the person who was involved in the accident. The terms upon which Mr. Coomber sold his car were that he sold it to this man for £10, £5 down and £5 to be paid at Mr. Pope's convenience. On receiving the £5, Mr. Coomber handed over this valuable car to Mr. Pope, who thereupon took it away, and afterwards drove it and used it as his own. He paid the £5 balance after the accident had taken place. Now Mr. Comyns Carr asks me to hold that Mr. Coomber still retained an interest in the car. The only interest that he retained, as far as I can see, was an interest to be paid £5. It was not an interest in the car. He may have had, as an unpaid vendor, an insurable interest for some purposes; I do not know, but he parted with the car. The property in the car passed on the sale, and a clearer instance of property passing at the time of sale of specific goods I confess I cannot well imagine. The car thereupon became Pope's property. Now, what became of the policy? What became of the piece of paper on which the policy was written? The policy was handed over by Mr. Coomber to Mr. Pope, and together with it was handed over an application form for a new policy, and the registration book. It looks to me very much as though Mr. Coomber was handing over the policy to Mr. Pope and saying: "Here, you have got to get a new policy made out." Mr. Coomber was making himself a party apparently, and, I should think, consciously making himself a party, to Mr. Pope driving his car away from the premises uninsured. I have no doubt that they thought they could safely take that risk, and, indeed, they were right, because no accident occurred on that occasion, but there is a great deal of force in what Mr. Samuels says, that that shows that there was no intention on Mr. Coomber's part to assign his property, if he could assign it, to Mr. Pope. I think that is quite right, but, as a matter of fact, whether he had the intention or not, I do not think, for the reasons I shall give in a moment, that he could assign it. However, he drove the car away, and then this accident happened thereafter.

As to the question of what happened to the policy, I think the policy lapsed. I think that there was thereafter no policy in existence upon this car, because the only person who was insured was Mr. Coomber, and Mr. Coomber had parted with the car. I think that, unless I held that, I should be going behind the principle in the case in the

House of Lords known as *Rogerson* v. *Scottish Automobile & General Insurance Co., Ltd.* (1), and I should also be disregarding—which I could do a great deal more easily—my own decision in the case of *Tattersall* v. *Drysdale* (2). If I thought that that decision was wrong, I should not hesitate to say that I thought it was wrong, if I thought better opinions prevailed, but I do not see any reason at present to doubt A that my decision in that case correctly followed the decision in *Rogerson's* case (1). The two cases are not quite the same. They were both cases in which the owner of a car who had insured it sold that car and bought another. In *Rogerson's* case (1), the owner met with an accident in his new car, and the question was whether or not he was using the car B in substitution for the insured car, because the extension clause in *Rogerson's* case (1) gave protection to a car owner if he was temporarily using another car in substitution for the insured car. The House of Lords held that the subject of insurance was a motor car, and that, if the motor car was sold, the insurance lapsed, and was at an end, and the C extension clause went with the policy. In *Tattersall* v. *Drysdale* (2), the facts were really much the same, but the point arose in a different way. Mr. Tattersall had bought a car which he had insured with one company. He parted with his interest in that car, and he got another car, insured with another company. The question was whether the D extension clause applied, because it applied only if there was no other policy in force as regards the car. I held that the policy was not in force, because he had sold his car. I said in *Tattersall* v. *Drysdale* (2), at p. 179:

> The words of the extension clause in this policy are different from those used in *Rogerson's* case (1), and Mr. Croom-Johnson argues that the latter case really E turned only on the construction placed on the phrase "instead of the insured car," which do not appear in the clause under consideration. But in my judgment that view is too narrow. I think that both in the Court of Appeal and the House of Lords the decisive factor was that the subject-matter of the insurance was the specified car, and that as the assured had parted with it he no longer was interested in the policy. The true view, in my judgment, is that the policy insures the assured in respect of the ownership and user of a particular car, the premium being calculated, as was found in *Rogerson's* case (1), partly on value and partly on horse- F power. It gives the assured by the extension clause a privilege or further protection while using another car temporarily, but it is the scheduled car which is always the subject of the insurance.

I held that the extension clause went with the rest of the policy. In this case, the extension clause is in these words:

G

> In terms of and subject to the limitations of and for the purposes of this section the corporation will treat as though he were the policyholder any person who is driving such vehicle on the policyholder's order or with his permission, provided (*a*) that such person is not entitled to indemnity under any other policy . . .

Then follow certain other matters, with which I need not deal. In order to bring himself within the Road Traffic Act, 1934, s. 10, it is H necessary for the plaintiff to show that he has got judgment against an insured person, and, unless he has got judgment against an insured person, he cannot use the provisions of the Road Traffic Act in enforcing his rights, or rather, the rights of the assured, against the insurance company. But, owing to another provision of the section in the Act of

1930, I held, in *Tattersall* v. *Drysdale* (2)—and that has not been reversed, and indeed I thought I was following expressions of opinion in the Court of Appeal in an earlier case—that, in view of the words of the Road Traffic Act, people driving with the consent or permission of the assured were persons insured under the policy, because it is a statutory provision which says that the insurers are to indemnify the persons or class of persons mentioned in the policy. Can it be said here, by any stretch of imagination, that Mr. Pope was driving by the order or with the permission of Mr. Coomber ? It seems to me that it is quite impossible to say that. He bought the car, it was his own car, and he was driving his own car, not by Mr. Coomber's permission, and certainly not under his order. He was driving it because it was his own car, and I think that, following *Rogerson's* case (1) and *Tattersall* v. *Drysdale* (2), I am bound to hold that, when Mr. Coomber parted with his car, his insurance *qua* that car lapsed, and that there was no insurance. Therefore I decide, first of all, that there was no insurance at all in force on the car at this time. It is quite impossible to say that a person who is driving his own car, which he has bought and the property in which is in him, is driving it by the permission or on the order of the person who sells the car.

The last point that was taken by Mr. Comyns Carr was that there was an assignment of the policy. I have already said why I do not think that there was an assignment in fact. I do not think that you can assign a policy of this nature at all. You can assign your right to receive money under it. If an accident has occurred, and you have a right to be indemnified by your insurers, or if your car has been destroyed, so that you have a right to be paid by your insurers, you can assign your right to anybody you choose, subject to the Road Traffic Act. In view of the statutory provisions, I do not think that you can assign away your right so as to prevent the injured person from recovering the money. At any rate, the insurance company would not pay it, because otherwise they might be liable to pay twice over. In all contracts of insurance—I am not dealing with marine insurance, because different considerations apply in marine insurance, nor am I dealing with life insurance, which is not really insurance in the proper sense of the term at all ; I am dealing with burglary, fire, accident, and so forth—I do not think you can assign the policy so as to make of what is a contract of personal indemnity to A. a contract of personal indemnity to B. I hope I have made that clear. You cannot thrust a new assured upon a company against its will. If you do that, you must have a novation. You must have the release of the assured and the acceptance of a new assured. It is not a question of assigning a chose in action, such as a debt, a right to recover money. A little reflection, I think, will show what a serious state of affairs might otherwise exist. The proposal form in this case, as in every case of motor insurance, asks questions with regard to the previous driving history of the proposer. The company want to know whether he is a man whose record is such that they can take him, and, if so, at what premium. His driving history or his driving experience must, I think, be a material fact. The moral factor, as it has been called, enters into these matters very considerably, not only in motor insurance, but also in most classes of insurance of this description. For instance, take the case of a person who wishes to insure jewellery. There may be people whose character is such that no insurance company would insure their jewellery for a single moment. There may be people who have had such an unhappy record of fires, or such an unhappy record of losses of jewellery, that only the most charitable could believe that those were fortuitous happenings. An insurance company, in those circumstances, would probably be very shy—I mean, respectable insurance companies; there are some insurance companies which, I have no doubt, as long as they can get a premium, will take it, though whether they will pay out at the end is another matter. However, I am considering respectable and proper insurance companies, and the moral factor is a factor which they take very much into account. In that class of insurance, nothing is more common in an action, where the policy is disputed on the ground of non-disclosure, than to say: "You have not disclosed a material fact here, namely, the accidents that you have had, or the fires that you have had, or the losses of jewellery that you have had." I have no doubt, therefore, that you cannot assign a motor policy in the way that it is suggested it was done here. If you sell your car, you cannot, merely by handing over your car and saying: "Take this policy and do what you can with it; I assign it to you," put the underwriters under an obligation to indemnify the purchaser, when they have agreed only to indemnify the vendor. Consequently, on all grounds here the action, in my opinion, fails. Sorry as I am for Mr. Peters, he is thus left with an award of damages and costs amounting to some £500, and only somebody who has not 500*s.* to proceed against. In this case, I cannot say that the person who injured him was insured. The fact was that he was driving an uninsured car. Whether he knew it or not, I do not know. I should think he probably did know it, inasmuch as his vendor gave him a form to fill in. However, that is not a matter with which the defendants are concerned. They are quite entitled to say, and do say: "We know nothing of Mr. Pope. He is not on our books, and, so far as we are concerned, he is an uninsured person." Therefore there must be judgment for the defendants, with costs.

Judgment for the defendants with costs.

Solicitors: *Musson & Co.* (for the plaintiff); *Kenneth Brown, Baker, Baker* (for the defendants).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

Re LADY MARY BOWDEN (described in the receiving order as LADY MURIEL BOWDEN) TRUSTEE IN BANKRUPTCY *v.* THE BANKRUPT AND ANOTHER.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Romer and MacKinnon, L.JJ.), **November 30, 1937.]**

Bankruptcy—Bankrupt married woman—Income under settlement provided by husband subject to restraint on anticipation—Alimony pendente lite—Proportion of income to be made available for creditors—Means of subsistence—Bankruptcy Act, 1914 (*c.* 59), *s.* 52.

The bankrupt, a married woman, was entitled, under a post-nuptial settlement made by her husband, a man of considerable wealth, to an income of £5,000 per annum, free of tax, subject to a restraint upon anticipation, and, in the event of her becoming discovert, the £5,000 per annum was subject to a discretionary trust of which she was one of two objects. In Sept., 1936, she presented a petition for the dissolution of her marriage, and in Aug., 1937, she was adjudicated bankrupt. An interim order for alimony *pendente lite* was made, giving her £10 per week pending the result of an application of the trustee in bankruptcy under the Bankruptcy Act, 1914, s. 52, for the whole or some part of the income of £5,000 per annum to be made available for the payment of creditors. Upon that application being made, the registrar ordered £3,000 per annum out of the £5,000 per annum to be paid to the trustee. It was contended that it was obligatory on the registrar in bankruptcy to make an order that the whole of the £5,000 per annum should be paid to the trustee, as the bankrupt had means of subsistence available, namely, the obtaining an order from the Divorce Court for alimony *pendente lite* or maintenance at a higher rate than that already awarded :—

HELD : it could not be said that, in the circumstances, the registrar had exercised his discretion upon any wrong principle. The creditors were not entitled, where the husband had provided these settlement moneys out of his own money, to throw the whole burden of supporting the bankrupt on the husband, and the order made ought not to be varied.

[**EDITORIAL NOTE.** It was suggested that the creditors had an equity that the wife should be supported by the husband, and thus make the whole income from the settlement available for the payment of the debts. The Court of Appeal has held that there is no such equity in favour of creditors, where the property settled has been provided wholly by the husband.

AS TO RESTRAINT ON ANTICIPATION AND BANKRUPTCY, see HALSBURY, Hailsham Edn., Vol. 2, pp. 199, 200, para. 270 ; and FOR CASES, see DIGEST, Vol. 5, p. 689, Nos. 6091, 6092.]

APPEAL from an order made by the registrar, dated Oct. 26, 1937, under the Bankruptcy Act, 1914, s. 52. The facts are fully stated in the judgment of SIR WILFRID GREENE, M.R.

Andrew Clark for the trustee in bankruptcy.

J. B. Blagden for the trustee of the settlement.

S. E. Karminski for the bankrupt.

Clark : The correct principle is that this lady should be supported by her husband, and not by the creditors, and the trustee should take the whole of the income under the settlement. By making an order for less than the whole of such income the registrar is disregarding the other means of subsistence altogether. He must act upon the assumption that the Divorce Court will award an adequate and sufficient sum for the wife's maintenance and not throw the burden of maintenance upon the creditors.

Blagden and *Karminski* were not called upon.

A

SIR WILFRID GREENE, M.R. : In this case, the bankrupt is a married woman. Her debts, as at present estimated, amount to the sum of £14,000. Under a post-nuptial settlement, executed on June 5, 1926, her husband, a man of considerable wealth, made a settlement upon her. Under that settlement, in the events which have happened, she is entitled B to an income of £5,000 a year, clear of income tax, subject to a restraint upon anticipation. That £5,000 a year, in the event of her becoming discovert, is the subject of a discretionary trust, of which she will be one of two objects. In Sept., 1936, she presented a petition for the dissolution of her marriage. In Aug., 1937, she was adjudicated bankrupt. C The present application is an application made by her trustee in bankruptcy under the Bankruptcy Act, 1914, s. 52, which provides as follows :

> Where a married woman who has been adjudged bankrupt has separate property the income of which is subject to a restraint on anticipation, the court shall have power, on the application of the trustee, to order that, during such time as the D court may order, the whole or some part of such income be paid to the trustee for distribution amongst the creditors, and in the exercise of such power the court shall have regard to the means of subsistence available for the woman and her children.

In the present case, there are no children concerned.

It appears that the bankrupt made an application to the Divorce Court E for alimony *pendente lite*, and an interim order was made for the payment of £10 a week, pending the result of the trustee's application under sect. 52 of the Bankruptcy Act. The registrar before whom the application came made an order under which £3,000 a year, part of the bankrupt's income under the settlement, should be paid by the trustees of F that settlement to the trustee in bankruptcy. There was a further order relating to a payment which the trustees of the settlement had already made, but had made (it is said) irregularly, in view of the fact that no order had then been made under sect. 52.

It is said by Mr. Andrew Clark, on behalf of the trustee in bankruptcy, G who appeals from that order, that, when the facts before the registrar are looked at, and when the order which he made is considered in the light of those facts, it is manifest that he must have come to his decision upon a wrong principle. It is not denied that, where the registrar has exercised his discretion under the section, without infringing the rules H which apply to the exercise of discretion, that would be a matter on which this court would not in general interfere. It is also admitted that, so far as *quantum* is concerned, again that is a matter for discretion ; and this court would not readily interfere when the registrar has exercised his discretion on proper principles. It is said here, however, that he must have exercised his discretion on wrong principles, and for this reason. It is said that the bankrupt had " means of subsistence available," the means of subsistence available consisting of her right to go to the Divorce Court and obtain an order for alimony *pendente lite*, and, ultimately, if she obtained a decree, an order for permanent maintenance. Then it is said that, as she has this means of subsistence, it was obligatory on the registrar to throw the burden of maintaining the lady upon those means of subsistence, in exoneration of her income under the settlement. The settlement would then become free, so to speak, for the making of an order under sect. 52, which would place that income at the disposal of the trustee in bankruptcy. It is said, and it must be said, I think, that the registrar was bound upon the facts to take that course. I do not take that view of the section. There is nothing in the facts before us, so far as I can see, to suggest that the registrar did not have regard to the circumstances to which I have referred. The whole matter was in evidence before him, and I shall assume that it was all present to his mind when he made the order. I cannot read the section as meaning that, in the circumstances of this case, once it has been brought to his notice that there is the possibility, or perhaps the certainty, of obtaining subsistence through the machinery of the Divorce Court, he is bound to throw that burden on the husband, and set the settlement fund free for the creditors. It seems to me that the direction to " have regard to the means of subsistence " means merely that the registrar must take all those circumstances into consideration, and must give such weight to them as, in the circumstances of the case, he deems to be fair and proper. I can quite well understand that, in the peculiar circumstances of this case, the registrar may have taken the view that it would not be right to use the machinery of this section in such a way as to impose on the husband the further burden which would be imposed if an order were made here which would result in the wife's obtaining full alimony from her husband in the Divorce Court. It seems to me that those are matters which the registrar is entitled to take into consideration when administering the section. There is nothing upon the face of the order, or on the facts before us, to suggest that he did not take into consideration matters that he ought to have taken into consideration, or that he took into consideration matters that he ought not to have taken into consideration.

In the result, I can see no ground for interfering with the discretion of the registrar, nor for saying that it was not properly exercised. The appeal must be dismissed with costs.

ROMER, L.J.: It is argued by Mr. Andrew Clark, in support of this appeal, that it was incumbent upon the registrar to direct the whole of the wife's income under this settlement to be paid to the trustee in bankruptcy under sect. 52, with a view to putting pressure on the Divorce Court to make to the lady an allowance *pendente lite* in excess of what that court would have granted had the wife been in possession of £5,000 a year. Mr. Andrew Clark suggested that there was some sort of equity, in a case such as the present, which made it only right and proper, to use his own phrase, that the wife should be supported by the husband and not by her creditors." I can see no such equity in the case. Here we have an instance of a husband who, out of his own moneys, A provided the wife with an income of £5,000 a year, sufficient, one would have thought, in all conscience, to enable her to live properly, and to discharge her debts as they accrued due. Why, when she has failed to do that, and has become bankrupt, the husband should be called upon to put his hand in his pocket for the purpose of maintaining her in favour B of creditors, who apparently, without making any adequate investigation into the lady's affairs, have given her credit to the tune of £14,000, I cannot see. I can see no such equity as has been suggested. For all I know to the contrary, the registrar has taken into consideration the whole circumstances of the case, and, in the exercise of his discretion, he C has come to the conclusion that £3,000 a year out of £5,000 a year be paid to the trustee and no more. I see no reason to suppose that he has exercised that discretion on improper grounds. I agree that this appeal must be dismissed.

D

MacKinnon, L.J.: I agree, and I do not think that I can usefully add anything.

Appeal dismissed with costs.

Solicitors: *Herbert Oppenheimer, Nathan, Vandyk & Mackay* (for the E trustee in bankruptcy); *Maxwell Brownjohn, Clark & Co.* (for the trustee of the settlement); *J. D. Langton & Passmore* (for the bankrupt).

[*Reported by* Reginald Townsend, Esq., *Barrister-at-Law.*]

WELLS v. METROPOLITAN WATER BOARD.

[King's Bench Division (Humphreys, J.), **November 10, 11, 1937.]**

Water Supply—Upkeep of fittings—Valve-box in roadway—Cover-plate left open by person unknown—No danger when cover closed—Liability of undertakers for injury to pedestrian.

The plaintiff was injured through tripping up over the cover-plate of a valve-box belonging to the defendant water board. When the cover of this valve-box was closed, it was in no way objectionable or dangerous, but on this occasion someone, presumably a child, had opened the cover, and, when open, it projected some 3 ins. or 4 ins. above the surface of the road. The cover could be opened quite easily, and was not fitted with any locking device, and there was evidence that the fitting of a locking device was both possible and reasonable :—

Held : the plaintiff's injuries were caused by the negligence of the defendants, and she was entitled to recover.

[EDITORIAL NOTE. In this case, it was admitted by the person responsible for the supervision of the valve-boxes not only that the lid was easily opened, but also that to his knowledge the lids had been tampered with from time to time by children. Having regard to this evidence, it was held that this was not a case of a malicious act by a third party, against which precautions would be inoperative, but a case of an act which it was known by the representatives of the undertakers was likely to happen, and against which precautions could be easily taken. This distinguished this case from that of *Simpson* v. *Metropolitan Water Board* (1), where it was held that precautions would have been quite inoperative.

As to Defective Apparatus in Streets, see HALSBURY, 1st Edn., Vol. 28, Water Supply, pp. 311, 312, para. 572 ; and for Cases, see DIGEST, Vol. 43, pp. 1096-1099, Nos. 266-290.]

Case referred to :

(1) *Simpson* v. *Metropolitan Water Board* (1917), 15 L.G.R. 629 ; 43 Digest 1099, *289*.

Action for damages caused by the lid of a valve-box placed by the defendants in a street being left open, apparently by the act of a third party. The facts are fully stated in the judgment.

Alban Gordon for the plaintiff.

H. O'Hagan for the defendants.

Humphreys, J. : The facts of this case are not in dispute. On the evening of Sept. 18, 1936, the plaintiff, a married woman, was walking from one side to the other of Hunt Street, Chiswick, at a turning which runs out of Hogarth Place. When she got nearly halfway across the road, she tripped and fell, and, as the result of the fall, she fractured a rib and suffered other injuries. She describes the time as dusk, and the evening as rather misty. She got up, and she and another witness saw at once—and it is not disputed—what it was that had caused her to trip. It was the lid or cover of a thing called a valve-box, which was put into the road for the purpose of containing a valve, an apparatus designed to enable the Metropolitan Water Board official—the turncock—when desired, to turn on or off the water from that section of the district. That cover is about 4 ins. long and 4 ins. wide,

and the cover itself is something between $1\frac{3}{8}$ ins. and $1\frac{1}{2}$ ins. thick.
It works upon a hinge. This hinge is not at the extreme end
of the cover, but within an inch or so of one end of the cover. The
cover can be lifted from the other end, and then revolves upon a hinge
so that an inch or so of it falls down into the box, and the other part
is more easily enabled by that means to stand and keep vertical. On A
this evening, the cover, which normally should be, and is designed to
be, flat with the surface of the road, was standing straight up, and, as
that means that three or four inches of it were above the surface of the
road, it constituted an obvious danger to any person who might happen
to come up against this without noticing it. No fault is attributed to B
the plaintiff, and none has ever been suggested. In those circumstances,
the plaintiff sues the defendants, the Metropolitan Water Board, which,
as I have said, had put that box in the road in accordance with their
statutory duties and powers. It is not suggested that either the box
or the cover of the box, so long as the cover remains in its natural position C
down, is in any way objectionable, nor is it suggested that either could
cause any injury to anybody.

The plaintiff puts her case in two ways. She says, first of all, that
the defendants were guilty of negligence in not taking proper steps to
prevent that cover from being vertical and becoming a danger. Secondly, D
she says that the cover constituted a nuisance. I do not think that
any distinction need be drawn between the two forms of claim. The
claim is also put in a third way. It is said that there was a breach by
the defendants of their statutory duty; but that really does not add
to the matter one way or the other. The defence is a general denial E
of negligence or nuisance or want of care.

The cover was examined after the accident by two people. One was
called for the plaintiff and one for the defendants, and they both agree
that the cover is so made and fitted that the end of it which is farthest
from the hinge does not fit right up to the edge of the slot into which F
it is supposed to catch. There is a space. It is said by the Metropolitan
Water Board that it is necessary that there should be such a space, in
order to open the cover, which has to be opened from time to time,
and it is essential that it should be able to be opened very quickly,
for a reason which everyone will understand. There may be a burst G
in the main in that part of the district, and one essential way of dealing
with the matter is to turn off the water. The turncock must be able
to turn off that water as quickly as possible, and, for that reason, he
must be able to open the cover as quickly as possible. It is said by the
Metropolitan Water Board that a convenient way, at all events, of enabling H
him to do that, is to have a sufficiently wide slot to enable him to insert
an instrument, which he carries for the purpose, in between the end of
the cover and the end of what I call the slot, so as to lift up the cover.

It is said by Mr. Videan, an architect and surveyor who examined it,
and it is agreed to by the defendants, that it is doubtful whether that

opening is wide enough to admit the fingers of a grown man, more particularly of the type of man who would be likely to be a turncock, who would have rather large hands probably, but it is amply sufficient to enable the small hands of children to pick it up. In this case, it so happens that there is no dispute as to what actually did cause this cover to rise. It is common ground, and, as it is common ground between the parties, I am satisfied to accept it. It is agreed that what has happened is this. Perhaps I had better just say why it is agreed. It was found that the top of the cover was covered with marks, the sort of chalk marks that are likely to be made by a child who finds a piece of chalk and who wants to scribble upon anything that it can find. To make it clearer still, when the bottom of the cover was examined, there were any number of other chalk marks, making it quite clear that the cover was lifted at some time that evening, no doubt by some child—I do not like to say a mischievous child ; I prefer to say a child acting in the manner in which one would expect a child to act. It may be naughty, it may possibly be mischievous, but there is nothing very wrong, and certainly nothing unexpected, about such conduct on the part of the ordinary child. It so happens that there is a large elementary school almost exactly opposite, within 20 ft. or 30 ft. of this valve-box.

Those being the facts, there is only one witness to whose evidence I need refer. That is Mr. Thorold, who was called as a witness by the defendants. He is a gentleman who, as distribution engineer in the employment of the Metropolitan Water Board, is responsible for various things, including these valve-boxes. He represents the Metropolitan Water Board in that respect. He said, first of all, that it is essential that these valves should be able to be turned off quickly, for the reason which I have already mentioned. He said that this type of box was designed about 1921, and that, in his opinion, it is the best type of box and cover that could be designed. He said that the hinge is made of phosphor-bronze, because that material does not corrode easily. It might get wet, but it would not corrode as iron would be likely to do. He agrees that, when new, and until it has become covered with grit or dirt, the cover can easily be opened, certainly by a child with its hand. The turncock uses a tool. It only becomes difficult to be opened by a hand small enough to get into this slot when grit and dirt make it difficult. He said that the Board had considered the question of whether some locking device should be employed to prevent such a thing as, for instance, a child opening the cover with its hand, and that the Board had come to a definite conclusion that it was undesirable that any form of locking arrangement should be used, because such a lock might conceivably become rusty. I think he said that one might expect it not more than once in two hundred times, perhaps, but still it might happen on some occasion, when that lock became rusty or encrusted with dirt, that it might stick, and then the turncock would be delayed in his beneficent work of turning off the water, which he cannot do until he has got the cover off. He said that there were in existence in London many thousands of valve-boxes of this type. In fact there must be a very great many thousands in the area covered by the Metropolitan Water Board, which I suppose, is the area of London and the suburbs, roughly; and he said that as many as 36,000 of these things had been fitted in the last four years, which gives some sort of indication of the number in use. He added that there had been only one complaint made to the Board in regard to this type of cover. He himself tried this cover after the accident, and agreed that it worked just as easily as if it had just been put down new. In cross-examination, he made this most important admission: that it was known to him, as a representative of the Board, that children were in the habit of tampering with these covers. I think his expression was that it was "well known that children were apt to tamper with them," and he used some other words which indicated, to my mind, and I am quite clear that he intended to convey to me, that he knew as a fact that children did, from time to time, precisely what anybody who knows anything about children would expect them to do —that is, having discovered that there was a nice little trap-door which they could open without any difficulty with their fingers, they did so.

That admission appears to me to destroy absolutely whatever importance might otherwise be attached to the evidence, which, of course, I accept unreservedly, of this gentleman that there had been only one complaint of an accident occurring in all these thousands of boxes. It means that in many cases it must be assumed that from time to time covers of different valve-boxes have been lifted, and one of two things probably has happened; either the child has replaced the cover after lifting it up, or, the cover having been lifted off in the daylight, as one would rather expect it to be by a small child, some person has come along and seen it, and replaced the cover, which could be done, as I gather, by a mere kick of the foot, and so it is that nobody has happened to have an accident. But the admission of Mr. Thorold results, to my mind, in this, that what happened here was precisely what might be expected to happen, except that the child, having done what children were wont to do, and might be expected to do, had not put back the cover, and it happened, perhaps because it was misty, and getting dark, that nobody else had come along and replaced the cover, and so it was that this unfortunate woman hit her foot against that cover, and sustained injury.

In those circumstances, those being the facts, Mr. O'Hagan submitted to me that, as a matter of fact, I ought to find that there was no negligence on the part of the defendants, and that, as a matter of law, they were protected by their statutory powers and duties, under which they had fitted this thing, and that I ought to say that this woman was debarred from recovering damages. Mr. O'Hagan relied to a considerable extent upon an observation of the late SHEARMAN, J., in *Simpson* v. *Metropolitan Water Board* (1). I desire to say that I should myself regard as most important any decision upon law or any view on fact expressed by the late Shearman, J., for whose opinion I have the most profound respect. In truth, I agree with every word which was uttered in that case by the judge. This is the headnote to that case:

> Where the proximate cause of the raising of an iron plate, lid, or covering of a water apparatus in a street of the metropolis, above the level of the pavement so as to be a dangerous obstruction by sticking up, is the malicious act of a third person against which precautions would have been inoperative, the Metropolitan Water Board is not liable to any one thrown down by it and hurt, in the absence of a finding that the occurrence could or ought to have been foreseen and provided against.

It was a woman who was injured in that case also. The facts of that case show that the woman who was injured was injured by a cover of some form or other which was quite different from the cover in this case. It must have been a very much larger thing, and it covered a different form of valve or apparatus. I say that because Shearman, J., after saying that he had seen it in court, said, at p. 632:

> I will tell you how the apparatus struck me. It seemed to me that it was placed in the position it was in by a man using one key or one hook only, because when two keys or two hooks are used the thing is raised up by the middle. You lift it up. A man who has two keys could lift it up evenly and would lift it straight up, and if he lifted it straight up would drop it straight down, and he would swing it back into its proper position with probably less trouble than putting it back in an improper position. But if a man had one key only he would lift it up on one side—a matter of considerable difficulty—and if he succeeded in lifting it up on one side only he would have considerable difficulty in getting it down level. It seems to me that this rather points to an inexperienced man having come and lifted the thing up.

It is quite obvious that that must have been a very different thing from this little cover, which, as agreed, can be lifted up by a mere child with its fingers. Shearman, J., made some observations on the law which I propose to read, first saying that I agree with every word of them. He said, at p. 632:

> The Water Board, the defendants, have the power to put these things in the public street; they have a statutory right to do it provided they do it with due care, and due care means that they are not bound to use every possible thing that could possibly be invented, that is to say, put down things that will not open without a special key or an apparatus with a door that shuts down by itself as soon as their turncock has finished making his inspection. All that they are bound to do—and there is no question that they have done it—is to use modern scientific appliances. It is perfectly clear that they did that here, because they have used a thing in this street which is used by tens of thousands in places like this for one purpose or another. I forget whether it was 30,000 or 40,000 that are used, and there has been no cross-examination about it. The defendants, having had these rights conferred upon them by Parliament, have quite properly put down this thing that they have put here. A different apparatus had been tried, but it was found that water had got into it, and they had to stop using it. Nobody pretends that they have not done their duty in that respect.

As I have said, I agree with every word of that statement. I agree with the proposition also enunciated by the judge, that, in such circumstances, the defendants would not be responsible for the unexpected act of a malicious person. The jury in the case to which I am referring found as a fact that the act was that of a malicious person. Now, does that case help me to decide this case? I do not think that it does. It appears to me that this is a totally different case. Indeed, for the very reason which in that case was held to exonerate the defendants, it appears to me that in this case the defendants are liable, for this was not an act of a malicious person which was unexpected—it was the act of a child which was precisely what would be expected, and was known by the representatives of the Metropolitan Water Board to be likely to happen.

For those reasons, I am of opinion that the plaintiff is entitled to recover in this case, on the ground that, whether it is treated as a matter of fact or whether it is dealt with as a question of law, the defendants have been negligent or have allowed a nuisance to exist for which they are responsible upon the highway, and which has damaged the person who was lawfully using the highway, as this woman was. I was pressed very much by Mr. O'Hagan with the terrible result to the Metropolitan Water Board if it were held in this case that this particular form of cover was not adequate; but, though I was much pressed, I was not impressed. It was said by the witness for the plaintiff, the surveyor, that, in his view, what ought to be done was that there should be devised some form of locking apparatus which would prevent this cover from being lifted. I do not necessarily take that view at all. It may be for the plaintiff, but it certainly is not for the court, to advise the Metropolitan Water Board as to how they should fit a little cover of this sort in such a way that the ordinary school child of tender years cannot lift it with its fingers, but I do not say that any locking apparatus is necessarily required at all. It occurs to one that it ought not to be difficult to find some simple form of locking apparatus, and I rather gathered from Mr. Thorold, the representative of the defendants, that the only objection to a simple form of key or locking apparatus was that it might possibly, on some occasion or other, get corroded, or get choked with dirt, so that it would not work quickly. But it also occurs to one that there is a possibility—I am not saying that this is the remedy, but that there is a possibility—that these covers might be made a shade larger, so that the interval between the end of the cover and that into which it is supposed to fit is not sufficiently large to enable the fingers of a child to be inserted and to lift the cover. That is another possibility. I am speaking now only as a mere layman. I am not an engineer, but it seems to me that that might possibly be done without preventing the turncock—who, for this purpose, has a special tool very much like the end of a rather wide chisel—from lifting it quite rapidly. However that may be, I cannot believe that it is impossible to devise some means whereby these things in the streets of London, which, if they are lifted up, are admittedly a danger and a nuisance at once, can be made safe against the ordinary fingers of the ordinary small child. As I have said, I think the plaintiff is entitled to recover.

Judgment for the plaintiff for £50 damages and £65 3s. special damage and costs.

Solicitors: *Musson & Co.* (for the plaintiff); *H. A. D. Collins* (for the defendants).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

GALE *v.* NEW.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Romer and MacKinnon, L.JJ.), **November 26, 29, 30, 1937.**]

A *Sale of Goods—Passing of property—Construction—Agreement to collect scrap-metal from some artillery ranges—Metal collected in a dump but not removed from the ranges—Ownership of metal in dump—" Collected therefrom."*

The plaintiff had entered into a contract with the War Office whereby he agreed " to collect during the currency of this contract the remains of exploded projectiles, practice shell, case shot and fuses lying on or about the artillery ranges . . . and in consideration of our being allowed to retain as our property all such remains, including metals, collected
B therefrom to pay annually " an agreed sum. This contract expired on June 21, 1936, and the defendant had a similar contract, which started on June 22, 1936. On June 22, 1936, there was on the ranges a dump of metal collected by the plaintiff, and the defendant removed and sold this metal. The plaintiff brought an action for conversion, and claimed that the property in the metal was his :—

C HELD : (i) the purpose of the contract was to clear the ranges of metal and this was not accomplished until the metal had been removed from the ranges altogether, and not merely collected in a dump.

(ii) the property in the metal did not pass to the plaintiff until he had so removed it from the ranges.

[EDITORIAL NOTE. This case turns upon the construction of the contract, and
D the particular word on which the construction turns is " collect," associated, however, with the word " therefrom." The case may be compared with the recent decision of the Divisional Court in *Spittle* v. *Thames Grit & Aggregates, Ltd.*, reported on p. 101, *ante.*

AS TO WHEN PROPERTY PASSES, see HALSBURY, 1st Edn., Vol. 25, Sale of Goods, pp. 175, 176, para. 313 ; and FOR CASES, see DIGEST, Vol. 39, pp. 502-504,
E Nos. 1206-1220.]

Case referred to :

(1) *Reigate* v. *Union Manufacturing Co.* (*Ramsbottom*), [1918] 1 K.B. 592 ; 12 Digest 347, *2888* ; 87 L.J.K.B. 724 ; 118 L.T. 479.

APPEAL by the defendant from a judgment of JUDGE CAVE, K.C.,
F given in the Salisbury County Court on June 3, 1937.

G. R. Blanco White, K.C., and *J. Scott Henderson* for the appellant.

J. G. Trapnell, K.C., *A. H. Armstrong*, and *B. A. Harwood* for the respondents.

Blanco White, K.C. : The only question here is the meaning of the
G word " collect." This is a much wider term than is the term " assemble." It includes the act of carrying away, since the expression used in the contract is " collect therefrom."

Trapnell, K.C. : If there is any obligation to remove the dump, it was waived by the government, as the officials had allowed the
H metal to remain in dumps for some time. The obligation to clear is distinct from the obligation to collect. The provision for the government to clear, and charge the expense against the contractor, shows that the property in the metal in the dumps had passed to the contractor. [Counsel referred to *Reigate* v. *Union Manufacturing Co.* (*Ramsbottom*) (1).]

Sir Wilfrid Greene, M.R.: The plaintiff and the defendant had contracts with the War Office covering successive years. The plaintiff's contract related to the period from June 22, 1935, to June 21, 1936. The defendant's contract related to the year beginning June 22, 1936, and ending June 21, 1937. Those contracts were in similar form, and they related to the clearance of the remains of shells from the War Department's artillery ranges on Salisbury Plain. The plaintiff during the period of his contract had collected a substantial dump of such remains, estimated to contain anything from 20 tons to 40 tons. At the date when his contract came to an end and the defendant's contract began, that dump was upon the ranges at a point quite close to a pumping station, to the west of the road leading from Salisbury to Devizes. The dump was actually on the War Department's land at that point. When the defendant came on the scene after his contract was made, he proceeded to remove that dump, or to sell it to another contractor who removed it—it does not matter which. The plaintiff claimed that the property in the metal forming that dump was his, and he accordingly brought the present action. The judge held that the property in the metal was in the plaintiff, and that the defendant had converted it, and he awarded the plaintiff £50 damages. The question depends entirely upon the construction of the plaintiff's contract. If, according to the true construction of that contract, the property in this metal was in the War Office at the date when the defendant's contract was made, it is not disputed that the defendant had the right to take it away and make it his own property. If, on the other hand, at the date when the plaintiff's contract expired, the property was in him, according to the true construction of his contract, then the defendant had no right under his contract to touch it.

The contract is to be found in a tender submitted by the plaintiff on May 23, 1935, and its acceptance by a letter signed on behalf of the Deputy Assistant Director of Ordnance Services at Tidworth, dated July 9, 1935. The tender is described upon its face as a "letter of undertaking." In the first words it proceeds to state concisely the nature of the contract which it is proposed to make. The subject-matter of the contract is described at the head of the letter as "Clearance of artillery ranges." The letter is addressed to His Majesty's Principal Secretary of State for War. The body of it contains this:

> Sir, I [the plaintiff], hereinafter styled the contractor, hereby engage to collect during the currency of this contract, the remains of exploded projectiles, practice shell, case shot and fuses lying on or about the artillery ranges at Salisbury Plain, Wiltshire, in accordance with the annexed conditions, by which we agree to abide, and in consideration of our being allowed to retain as our property all such remains, including metals, collected therefrom to pay annually the sum of £26 5*s*. each half year.

Pausing there for a moment, it is important to observe that the governing purpose of this contract is to clear the artillery ranges. It starts by imposing upon the contractor an obligation which is stated to be an obligation to collect "the remains of exploded projectiles . . . lying on or about the artillery ranges at Salisbury Plain." That is the substantive obligation undertaken by the contractor, and it is to that obligation that the conditions annexed to the letter refer. In addition to his obligation to collect, he undertakes to pay an annual sum, and the property in what he collects is to become his.

There is a number of conditions, but it is necessary to refer to only one or two of them. Clause 1 is:

> The contractor shall collect the remains of exploded projectiles, practice shell, case shot and fuses lying on or about the artillery ranges at Salisbury Plain, Wiltshire. He shall, as far as possible, keep the ranges clear of such remains from time to time as opportunity affords throughout the year. The remains, including metal, when collected by the contractor, shall become his property.

Then cl. 2 provides for two half-yearly payments. Clause 4 imposes upon the contractor an obligation not to "disturb or remove any unexploded projectiles," and an obligation to report the place where he finds them. Clause 6 says:

> Every man employed by the contractor to collect the metal of exploded projectiles shall sign a stamped agreement that he will respect cl. 4.

Clause 4 is the clause which provides that unexploded projectiles shall not be disturbed, but that their position shall be reported. Clause 7 provides for the putting up of a public notice, stating the conditions of the contract. That is to be put up by the commandant of the Artillery School at Larkhill, and to be publicly exhibited. The clause ends with this expression, "and troops will be forbidden to collect the old metal." Clause 8 provides for the period of the contract. It is to last from June 22, 1935, to June 21, 1936, unless terminated earlier, and there is a provision that either party can give three calendar months' notice in writing. Then cl. 8 goes on as follows:

> That if the contractor shall, in the opinion of the Major-General in command, Administration, Southern Command, fail to clear the ranges satisfactorily within the time stipulated in cl. 1, the Under-Secretary of State for War shall be at liberty to have the service carried out by the troops or otherwise, and any expense incurred thereby shall be recoverable from the contractor. The Under-Secretary of State shall also be at liberty to terminate the contract at the date of or subsequent to such default without notice; and in the event of such termination the contractor shall have no claim to any rebate in respect of any half-yearly payment which has been made, or has become due by him under cl. 2.

Clause 11 says:

> The contractor shall not collect metal on the ranges during the time practice is going on but shall obey the orders in this matter of the commandant, School of Artillery, Larkhill.

Then the form ends up with an estimate, no doubt for the guidance of the contractor who proposes to tender. The estimate states:

> During the six months ending Dec. 22, 1934, the approximate weight of metal recovered was 20 tons. No guarantee, however, can be given as to this quantity being recoverable during the ensuing year.

It is said on behalf of the plaintiff, and the judge in the county court has so held, that the property in this particular dump became the property of the plaintiff, upon the ground that it had, within the meaning of cl. 1, been collected by him. In other words, it is said that, in order that the property may pass, it is sufficient for the contractor to make such a collection of pieces of metal as we have had to consider in this case, and that, as soon as he has done that, the property will pass, notwithstanding the fact that he has not cleared the metal off the ranges. I am unable to take that view. It appears to me that, when this document is carefully examined and understood, the obligation of the contractor is to clear the ranges, and the property passes to him only in so far as he has carried out that obligation. As I said a moment ago, the governing characteristic of this contract is that it is a contract for clearance of the artillery ranges. The obligation to clear is expressed in the body of the document in the form of an undertaking to collect. It would be strange if a document entered into for the purpose of getting the ranges cleared should start off in its initial words by imposing upon the contractor an obligation which would not effect that object, because it cannot be suggested that a contractor who collected metal into a dump and left it on the range would have cleared the range. Accordingly, the very language in which the contractor's obligation is couched, at the outset, appears to me to point to a meaning of the word "collect" which will have the result that his obligation to collect will not be carried into effect merely by raking the scrap-metal together into a heap. Another indication to that effect in the body of the letter is to be deduced from the word "therefrom." The consideration which the contractor is to obtain from this contract is the permission to retain as his property the remains which he collects. But it is significant that that clause refers, not to remains collected, but to remains "collected therefrom"—that is to say, from the artillery ranges. The use of that word confirms me in my view that the word "collection" in the body of this letter is used in the sense of gathering in from the ranges—that is to say, getting the remains off the ranges. Whether or not in the process there is an intermediate stage of raking them together, or collecting them into dumps, appears to me to be quite immaterial. It would be a performance of this contract if the plaintiff carried it out by walking on to the ranges and picking up the remains one piece at a time and taking them away. That would be a collection within the meaning of this clause. It would be a clearance of the range. The intermediate stage of forming the remains into a dump appears to me, on the face of this paragraph, neither to carry out the contractor's obligation to collect nor to have the result of making the property in the contents of that dump vest in him. The conditions are expressed as being the terms in accordance with which the primary obligation to collect is to be carried out. The first condition repeats the obligation to collect the remains of projectiles. The second part of that condition deals with the matter of keeping the ranges clear. The contractor is, as far as possible, to:

> keep the ranges clear of such remains from time to time as opportunity affords

throughout the year. The remains, including metal, when collected by the contractor, shall become his property.

I am unable to read those two phrases, "keep the ranges clear" and "collected by the contractor," as being otherwise than co-extensive. It seems to me that to construe this condition in such a way that, notwithstanding the fact that the ranges were not kept clear, the property in the metal should pass to the contractor would be to defeat its manifest meaning, and in particular would be to alter completely the meaning governing the paramount clause in the body of the contract. It seems to me that the contractor does not carry out his obligation to keep the ranges clear merely by collecting the material in a dump on the range. It is when he has cleared the range that the property becomes vested in him. In other words, collection in this clause, as in the body of the contract, is not effective, for the purposes of this contract, so long as the metal remains on the range.

There are other indications in the contract which appear to me very clearly to confirm that view. The first one to which I wish to refer is that connected with unexploded projectiles. It is a small point, but I think it confirms the view which I have taken of the main provisions of this document. Clause 6 imposes an obligation on the contractor to obtain from every man employed by him "to collect the metal" a stamped agreement to respect cl. 4, the clause which deals with unexploded projectiles. If the argument presented on behalf of the plaintiff be the correct one, a man who was sent to remove this dump would not come within cl. 6, because *ex hypothesi*, according to the argument, the metal has already been collected, and the process of collection is complete. A man employed to remove that heap of metal would not be a man employed to collect the metal, and accordingly there would be no obligation to obtain from him a stamped agreement. That, I agree, is only a very slight indication, but in cl. 7 there is a stronger one. The provision that "the troops will be forbidden to collect the old metal" appears to me quite clearly to indicate that that stipulation, which, as ROMER, L.J., has pointed out, is put in for the benefit of the contractor, would fail in its effect if all that it related to was collecting into heaps. From the point of view of the contractor, the important thing is that the material should not be removed by persons other than those authorised by himself. Although the troops, by collecting it into inconvenient heaps, might be interfering with his method of clearing the ranges, nevertheless, the real vice is removal. This covers, to my mind, quite clearly, the case of troops removing the metal from the ranges. If a soldier walking on the ranges saw a fuse, for instance, and picked it up and walked away with it off the ranges, he would have committed a breach of this provision. The mere picking up of that fuse and its removal from the range would be a collection by him within the meaning of cl. 7.

The next indication is to be found in the provisions as to terminating the contract. If the contractor fails to clear the ranges satisfactorily, there is power, first of all, to have that service carried out by the troops, and also a power to terminate the contract. If the argument addressed to us by counsel for the respondent be correct, the curious result would follow that a contractor who had collected the metal into dumps and left it there, not having carried out his obligation to clear, would nevertheless retain the property in the metal that he had collected into these dumps. It seems to me that what cl. 8 is contemplating is, in circumstances of that kind, that the contractor will drop out of the picture altogether. Otherwise a very curious result would follow, because, according to the argument, the property would still remain in him, and yet he would have no right whatsoever to go and fetch it, as the termination of his contract would put an end to his right to go upon the land and remove it. Clause 11 points in exactly the same direction. It provides :

> The contractor shall not collect metal on the ranges during the time practice is going on but shall obey the orders in this matter of the commandant, School of Artillery, Larkhill.

In that paragraph it seems to me that that word " collect " quite clearly covers, not merely the collection into dumps, but also the whole process, including the process of removing dumped metal. If the argument on behalf of the plaintiff be accepted, the very curious result would follow that, taking this particular dump, though cl. 11 would apply while the metal was being gathered into that dump, it would not apply in the case of its removal. Accordingly, it would be possible for the contractor, while practice was going on, without taking any notice of the commandant's orders, to send a man with a cart to remove the dump. It seems to me that that is quite an impossible construction to put upon cl. 11. It is obvious to my mind that, if the contractor, having collected the metal into the dump, sent somebody to remove it, he would be collecting within the meaning of the clause, and would be precluded from doing so while practice was going on.

The fallacy of the whole argument, to my mind, consists in treating collection as an operation which necessarily stops at some particular stage. The contractor could perform this contract in a variety of ways, providing he removed the scrap-metal off the ranges. He could do it by first raking it together in one dump, or into 20 dumps, and then removing it. He could do it by picking it up and taking it off piece by piece. The entire process, whatever the method he used, would be a process of collection, which might fall into various stages according to the particular method he adopted. But the completion of the process of collection, whatever intermediate stages he chose to go through, in my opinion would quite clearly not be reached, for the purposes of this contract, until the metal was cleared from the range. It is then that the property would vest, and not before. In my opinion, the appellant in this case is right, and the appeal must be allowed.

ROMER, L.J. : I, too, have come to the conclusion that in this contract the word "collect" means remove from the ranges. My reasons for coming to that conclusion are precisely those that have been stated by SIR WILFRID GREENE, M.R., and I will not take up time by endeavouring to repeat those reasons in language less felicitous than
A that which he has used. I agree that the appeal must be allowed.

MACKINNON, L.J. : I regret that I am constrained to agree. The result of the case is hard upon Mr. Gale, and perhaps Mr. New's conduct was rather shabby. However, whether, when Gale sued New, he could
B allege that this metal was his, Gale's, property, is a pure question of law. I must abstain from allowing a hard case to make bad law. I agree that the true legal result is that he could not assert that the property in the metal in this dump was vested in him.

Appeal allowed with costs here and below.

C Solicitors : *Pennington & Son*, agents for *Lemon & Humphreys*, Swindon (for the appellant) ; *Cunliffe & Airy*, agents for *Shenton, Pain & Brown*, Winchester (for the respondent).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

D

MERCANTILE BANK OF INDIA, LTD. *v.* CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA, AND STRAUSS & CO., LTD. (IN LIQUIDATION) (No. 2).

CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA *v.* MERCANTILE BANK OF INDIA, LTD., AND STRAUSS & CO., LTD. (IN LIQUIDATION) (No. 2).

E

[KING'S BENCH DIVISION (Porter, J.), **October 20, November 15, 1937.]**

Bankers—Advances—Secured by trust receipts—Produce in warehouse purchased with money advanced to be held as agent for or in trust for bank—Whether equitable charge or declaration of trust.

F The defendant bank advanced money to the defendant company, sometimes by way of overdraft and at other times by way of advance on loan account. These advances were secured by trust receipts, by which the company agreed that goods purchased with such advances should be held by them as agents for and in trust for the bank, the intention being that the bank should be entitled to such goods as security
G for the advance. There was, *inter alia*, an undertaking to deliver the goods to the bank to enable it to sell the same :—

HELD : these documents created an equitable charge upon the goods, and not a trust in respect of them.

[EDITORIAL NOTE. The question here is the nature of the charge created by the bank documents, which are in a not unusual form where advances are made
H upon the goods for the time being in the warehouses of a company. In the present case the decision is necessary to decide whether the documents required registration under an Indian Act ; but there is importance in this decision as to the exact legal effect of the documents apart from the question of registration.

AS TO DISTINCTION BETWEEN EQUITABLE CHARGE AND DECLARATION OF TRUST, see HALSBURY, Hailsham Edn., Vol. 23, pp. 231, 232, paras. 339, 340 ; and FOR CASES, see DIGEST, Vol. 35, pp. 244-249, Nos. 51-83.]

Cases referred to:

(1) *Re Allester (D.), Ltd.*, [1922] 2 Ch. 211; Digest Supp.; 91 L.J. Ch. 797; 127 L.T. 434.

(2) *Wrightson* v. *McArthur & Hutchisons*, [1921] 2 K.B. 807; Digest Supp.; 90 L.J.K.B. 842; 125 L.T. 383.

(3) *Morris* v. *Delobbel-Flipo*, [1892] 2 Ch. 352; 7 Digest 19, *82*; 61 L.J. Ch. 518; 66 L.T. 320.

(4) *Dublin City Distillery, Ltd.* v. *Doherty*, [1914] A.C. 823; 7 Digest 20, case *88i*; 83 L.J.P.C. 265; 111 L.T. 81.

(5) *National Provincial & Union Bank of England* v. *Charnley*, [1924] 1 K.B. 431; Digest Supp.; 93 L.J.K.B. 241; 130 L.T. 465.

(6) *Madras Official Assignee* v. *Mercantile Bank of India, Ltd.*, [1935] A.C. 53; Digest Supp.; 104 L.J.P.C. 1; 152 L.T. 170.

(7) *Re Slee, Ex p. North Western Bank* (1872), L.R. 15 Eq. 69; 7 Digest 27, *135*; 42 L.J. Bcy. 6; 27 L.T. 461.

(8) *Re Steele, Ex p. Conning* (1873), L.R. 16 Eq. 414; 7 Digest 23, *109*; 42 L.J. Bcy. 74.

(9) *Re Jeavons, Ex p. Mackay, Ex p. Brown* (1873), 8 Ch. App. 643; 7 Digest 23, *108*; 42 L.J. Bcy. 68; 28 L.T. 828; *subsequent proceedings* (1874), 9 Ch. App. 304.

Issue of law directed to be tried to determine whether certain documents called trust receipts created a trust, an equitable charge or a legal charge upon the property referred to therein.

The following documents are the two forms of trust receipts in question in this case. Only the first paragraph of the second document is here reproduced, the document being otherwise similar to the first, except for the necessary adaptation to an advance by loan instead of by overdraft.

> 1. Advances in account current on produce awaiting shipment.
>
> To the Chartered Bank of India, Australia & China, Karachi,
>
> In consideration of your allowing me/us to overdraw my/our current account from time to time, the total overdraft not at any time to exceed Rupees 8 Lakhs I/we hereby agree that all cheques drawn on my/our current account shall be supplied by me/us solely in the purchase of produce, and in the event of an overdraft being created by reason of your honouring such cheques, then, until such overdraft has been repaid to you, either by proceeds of bills of exchange sold to you, or in cash, all such produce as shall be purchased by me/us by means of such cheques and overdrafts shall be kept apart by me/us from all other goods or produce in my/our godowns, and shall be held by me/us as agent and in trust for you and kept fully insured by me/us against loss by fire I/we holding such insurance and all moneys receivable therefrom in trust for you and handing you forthwith all amounts received from the insurers.
>
> The intention of this agreement is, that you are to be entitled to such produce as security for my/our overdraft for the time being, I/we holding such produce as agent and trustee for you, and in the event of my/our failing to repay to you the amount of my/our overdraft when called upon to do so, I/we hereby undertake to deliver to you at any time the said produce, without raising any question, to enable you to sell, or at your discretion to ship the same for the purpose of realisation under your directions.
>
> I/we also further agree and undertake immediately upon shipment of the produce or any part thereof to hand to you the shipping documents for the same or their equivalent in cash.
>
> I/we will, whenever required, give you full particulars of the produce held by me/us on your behalf, and I/we hereby guarantee that its value shall at all times be equal to and shall be maintained at the amount of my/our overdraft.
>
> It is understood that the keys of the godown remain in my/our possession, and I/we, likewise, further agree and undertake to have no advance from any other bank on the same or any other produce in my/our godowns in which produce under lien to you is stored so long as I/we am/are indebted to you.
>
> And I/we further agree that the goods shall also be a security to you for the

payment on demand of all other moneys which are now or shall at any time be due to you from me/us either alone or jointly with any other person or persons, either on account current or for money advanced or paid or in respect of bills, drafts or notes accepted, paid or discounted, interest, commission, or any other usual or lawful charges or on any other account whatsoever, together with all costs and expenses.

2. Loans on produce awaiting shipment.
To the Chartered Bank of India, Australia & China,

In consideration of your making to me/us an advance by way of loan to the amount of Rupees 8 Lakhs, I/we hereby agree that the whole thereof shall be applied by me/us solely in the purchase of produce, and until the said advance has been repaid to you, either by proceeds of bills of exchange sold to you, or in cash, all such produce as shall be purchased by me/us by means of such advance shall be kept apart by me/us from all other goods or produce in my/our godowns, and shall be held by me/us as agent and in trust for you, and kept fully insured by me/us against loss by fire, I/we holding such insurance and all moneys receivable therefrom in trust for you, and handing you forthwith all amounts received from the insurers.

Sir William Jowitt, K.C., and *C. P. Harvey* for the plaintiffs.

H. U. Willink, K.C., and *H. G. Robertson* for the first defendants.

H. Wynn Parry, K.C., and *J. P. Ashworth* for the second defendants.

PORTER, J.: This is an issue to be tried by me as a preliminary question before determining whether the defendant bank had any rights in fact to enforce, on Jan. 25, 1935, a charge alleged to have been given to them by Strauss & Co., Ltd., over certain goods then stored in the godowns of Messrs. Strauss. The claim arose in this way. The defendant bank had advanced money to Messrs. Strauss over a considerable period. So far as the present question is concerned, those advances, or some of those advances, purported to be secured by certain documents. These documents, which are headed "trust receipts," take two forms: (i) where the advances are in account current, and (ii) where they are loans on produce. However, I do not myself think that, so far as my present decision is concerned, anything turns upon the difference between those two forms. Originally, at the trial of the action, the defendant bank were inclined to think that they could not prove facts showing that any advance had been made by them to Strauss & Co., Ltd., such as would entitle them to say that the security purporting to be created by these documents had become effective. Later, however, on ascertaining the facts more exactly, they contended that it had become effective. The plaintiff and the defendants, Strauss & Co., maintained that, however this might be, the documents were void, and gave no security, for various reasons set out in their reply and defence. Ultimately, the only reason relied upon was that the documents had not been registered under the Indian Trusts Act, 1882. As this contention would, if successful, defeat the defendant bank's claim, and obviate the necessity of calling a large body of evidence to prove the indebtedness of Strauss & Co. to the defendant bank, the use made by Strauss & Co. of individual advances, and their dealings with the goods purchased by such advances, I directed an issue to be tried to determine this question, and fixed Oct. 19 for hearing arguments. After hearing the parties, I reserved judgment.

The point is a short one, and depends upon the true interpretation and application of the Indian Trusts Act, 1882. It was at one time contended by Mr. Willink for the defendant bank that the Act had not been shown to extend to Karachi, where some of the produce claimed was stored, but I think that there is no doubt that it does so extend. See note 3 to sect. 1 of the Act. In any case, it admittedly applies in the case of some of the godowns where the produce was stored. A trust is defined by sect. 3 of the Act. One dispute between the parties was as to whether or not the documents under discussion created a trust within the meaning of the Act. I return to this question later. Sect. 5 enacts :

> No trust in relation to immovable property is valid unless declared by a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered, or by the will of the author of the trust or of the trustee. No trust in relation to movable property is valid unless declared as aforesaid, or unless the ownership of the property is transferred to the trustee.

In construing this section, the defendant bank argued that, in the case of a trust in relation to immovable property, the trust must be both declared and registered, but that, in the case of a trust in relation to movable property, it need be declared only, and not registered. This would make the first paragraph read as follows : "No trust, etc., is valid unless (i) declared, (ii) registered." I do not think that this is right. The trust is not registered ; the instrument is. I think the true meaning is : "No trust, etc., is valid unless declared by an instrument in writing, which instrument is signed, etc., and registered." In my view, the trust is not duly declared unless that declaration is contained in a written registered instrument. "Declared as aforesaid" in para. 2, therefore, means declared by a written registered instrument, and an unregistered declaration in writing is not enough. This is the view put forward by the plaintiffs, and supported by Messrs. Strauss & Co., and is, I think, right.

Sect. 6 sets out how and when a trust is created. The main argument on behalf of the defendant bank was that these documents did not create a trust, or, at any rate, not a trust within the meaning of the Indian Trusts Act. The plaintiffs and Messrs. Strauss & Co. based an argument on the allegation that it was difficult, if not impossible, to tell when the trust, as they maintained it was, came into force, since its existence depended upon the acquisition by Strauss & Co. of property subject to the trust, and the borrowing of money to purchase that property. Any such difficulty appears to me to be one of fact, and not of law, and to be immaterial to the point I have now to decide. They also contended, however, that the documents constituted trusts of movable property, and that, to be valid, they must be registered. In support of this view, they pointed out that the documents were headed "Trust receipts" and provided for the holding of the goods by Strauss & Co. in trust for the defendant bank.

The defendant bank contended that the provisions of the Indian Trusts Act were confined to express trusts and that the documents did not declare express trusts. Moreover, they maintained that, if the Act were considered as a whole, many of its provisions were inapplicable to the kind of right the bank obtained under the terms of these documents. The documents, they said, must be looked at as a whole. So considered, they were business documents, charging property as and when it came into the hands of Strauss & Co., and creating an equitable or floating charge on goods of which Strauss & Co. were, or should become, owners, and the defendant bank pledgees. In their contention, Strauss & Co. were at most agents, and not trustees. Had the property been physically transferred to the defendant bank, either by storage in their godowns or by storage in a portion of Messrs. Strauss's godowns, and the key handed over, there would, in my view, have been created a legal charge which would have remained none the less legal though the property had later been re-transferred to Messrs. Strauss for realisation on the defendant bank's behalf : *Re Allester* (*D.*), *Ltd.* (1), *Wrightson* v. *McArthur & Hutchisons* (2), and *Morris* v. *Delobbel-Flipo* (3), where it is said, by STIRLING, J., at p. 360 :

> If possession is actually taken of the property when it comes into existence, then a legal interest is acquired.

But where, as here, the property never was physically transferred, either actually or symbolically, I think the better view is that there is either a trust or an equitable charge, and not a legal charge : *Dublin City Distillery, Ltd.* v. *Doherty* (4), *National Provincial & Union Bank of England* v. *Charnley* (5), *Madras Official Assignee* v. *Mercantile Bank of India, Ltd.* (6).

Holding this view as I do, it has yet to be determined whether the several documents create a trust or an equitable charge, and, if the latter, whether the existence of an equitable charge makes the giver of it a trustee and the giving the creation of a trust. These questions, as I think, must be answered on a broad construction of the documents and their legal effect. That an equitable charge is not necessarily a declaration of trust seems to have been conceded in argument in *Re Slee, Ex p. North Western Bank* (7) and to be implicit in the judgment. It is true that that case, like all the cases I have cited, turned upon the provisions of the Bills of Sale Act then in force, and one ground for the decision was that the document then under discussion was a business document ; but SIR JAMES BACON, C.J., put his decision on a wider basis—namely, that the class of document with which he was dealing was not the class of document intended to be dealt with by these Acts, i.e., was not (amongst other things) a declaration of trust. In this view, it does not matter that equitable charges are now included in the definition of bills of sale, or that, in *Re Steele, Ex p. Conning* (8), the document there under discussion, being an equitable assignment, was held to be within the working of the Bills of Sale Act, 1854, that wording being "other assurances of personal chattels," and therefore registrable as a bill of sale. Indeed, in *Re Jeavons, Ex p. Mackay, Ex p. Brown* (9), at p. 649, Mellish, L.J., states that the document there in question, although an equitable assignment, was not " a declaration of trust without transfer."

In these circumstances, I think that I have to determine broadly whether the documents are declarations of trust or equitable charges. The question is not free from doubt, since the expressions " as agent for you " and " under lien to you " are to be found contrasted with the words " in trust for you." Despite the use of the word " trust," I hold that the general effect of the documents is to give to the bank an equitable charge, and not to create a trust, and therefore they are not void for want of registration under the Indian Trusts Act.

I think it is plain, however, from what I have said, that in this case the security is given by the documents, and not by some extraneous act outside the documents. So that the defendant bank's rights depended upon the documents, and therefore, if, in my view, the documents had created a trust, they must be registered : *Wrightson* v. *McArthur & Hutchisons* (2), at p. 814. But, as I think that they do not create a trust, I do not think that they require registration, and I determine the issue in favour of the defendant bank. The costs of the plaintiffs and the second defendant must be paid by the defendant bank, inasmuch as that defendant in the first instance was prepared to concede its inability to prove such facts as would raise this point.

Solicitors: *E. F. Turner & Sons* (for the plaintiffs); *Linklaters & Paines* (for the first defendants) ; *Slaughter & May* (for the second defendants).

[*Reported by* W. J. Alderman, Esq., *Barrister-at-Law.*]

Re AN APPLICATION BY RICHARD WOODWARD ON BEHALF OF RICHARD WOODWARD AND DORIS WOODWARD, TRADING AS R. & D. TRANSPORT. RICHARD WOODWARD AND DORIS WOODWARD, TRADING AS R. & D. TRANSPORT *v.* NORTH WESTERN TRAFFIC AREA LICENSING AUTHORITY.

[Chancery Division (Farwell, J.), **December 3, 1937.**]

Street Traffic—Road haulage of goods by motor vehicles—Carriers' licence—Application to transfer licence—Whether licensing authority can hold an inquiry—Road and Rail Traffic Act, 1933 (*c.* 53), *s.* 11.

A haulage contractor was the holder of an " A " licence under the Road and Rail Traffic Act, 1933. On his death his widow took out letters of administration to his estate and was granted an " A " licence. She was not, however, able to carry on the business, which was managed by one of the applicants, who had arranged to purchase the business from her. The applicants applied to the respondent licensing authority to obtain what was in effect a transfer of the licence to themselves. The respondents stated that they proposed to publish the application and consider it at a public inquiry. It was contended that as this was an application for a licence, to expire not later than the existing licence, to use a vehicle in a business which the applicants had acquired, it was not an application under sect. 11, and that therefore the respondents had no authority to publish the application, or to hold an inquiry :—

Held : in order to ascertain whether the case was within one of the exceptions in sect. 11 (3) (*b*), the respondents would have to satisfy themselves about a variety of matters, and that could be done only by means of an inquiry. Sect. 11 (5) of the Act gives them express authority to hold such an inquiry if it be thought necessary for the proper exercise of their functions under the Act.

[**EDITORIAL NOTE.** The practice of the licensing authorities appears to be that they do not require a public inquiry where the transferor of the business is actually carrying on, and using the vehicle in, the business being sold. Here the widow who was not carrying on the business of her late husband sought, in effect, to transfer the licence. The court has decided, however, that in every case the authority has a discretion to hold an inquiry, wherever it is thought desirable in the public interest.

AS TO APPLICATIONS FOR LICENCES FOR ROAD HAULAGE VEHICLES, see HALSBURY, Supp., Street Traffic, para. 562; and FOR CASES, see DIGEST, Supp., Carriers, No. 1559-1565.]

Case referred to:

(1) *Ex-Army Transport, Ltd.* v. *Diamond & Co., Ltd.* (1936), 24 Ry. & Can. Tr. Cas. 303; Digest Supp.

ORIGINATING SUMMONS taken out by Richard Woodward and Doris Woodward, trading as R. & D. Transport, against the North Western Traffic Area Licensing Authority, for the determination of the question whether it was necessary or lawful for the defendant authority to hold an inquiry concerning the application of the plaintiffs for a licence. The plaintiffs carry on business in Lancashire as public carriers, and they already hold a licence from the defendants. The plaintiffs applied to the defendants for a licence to enable them to run a vehicle which was already licensed and had been used in a business which the plaintiffs were acquiring. The business had been carried on until recently by a man now deceased, and the plaintiffs were acquiring it from his widow, who had neither the ability nor the resources to carry on the business.

Gerald A. Thesiger for the applicants.

Valentine Holmes for the respondent.

Thesiger, for the applicants: My clients hold one licence, and are therefore fit and proper persons to hold another. If they were acquiring the business of a company, they could acquire the shares, and obtain the whole of the interest. It is admitted that the application could be refused, and there could be no appeal, but the plaintiffs object to being treated as though sect. 11 applied to this application. If the applicants desire to continue to use the vehicle authorised, without altering the position otherwise, the application is non-notifiable. The Act gives a right to hold a public inquiry in the case of notifiable applications, but there is no right to hold an inquiry in the case of a non-notifiable application.

Holmes, for the respondent: The matter, although it is of considerable importance, falls within a very small compass. By the Act of 1933, Parliament has provided very careful machinery for the issue of licences. It is obvious that a practice may spring up, under the machinery which is being used by the applicants in this case, of people who have not a real business at all, but who have licences, seeking to transfer those licences and get well paid for it. The machinery for granting the application of an "A" licence provides that, when application is made, the licensing authority must be satisfied with regard to a number of matters specified in the Act. This particular licensing authority takes the view that the best method is to notify the public, so that anybody who takes objection to the application can bring his objection before the authority, who can hold a public inquiry. The only question is whether the authority is precluded by anything in the Act from giving the notice contemplated and from holding an inquiry. He is not so precluded. No want of good faith on the part of the present applicants is suggested. The licensing authority has to determine whether the case comes within the exception provided by sect. 11 (3) (*b*), because it is an application for an "A" licence. By sect. 5, an applicant must submit a statement in the prescribed form, giving any information which the licensing authority may reasonably require for the discharge of his duties in relation to the application. It would be ridiculous if, after Parliament has said that the applicant must give this information, the licensing authority were not to have a proper opportunity of testing the correctness of the information, and the proper way to test it is by a public inquiry. The Act states that the authority must use a discretion. That cannot be done better than by hearing everybody fully and openly. The licensing authority is entitled to hold an inquiry quite apart from sect. 11 (5).

Farwell, J. : This is a summons taken out by Richard Woodward and Doris Woodward, trading as R. & D. Transport, against the North Western Traffic Area Licensing Authority, asking for the decision of the court as to a question which arises really on the construction of the Road and Rail Traffic Act, 1933. The question arises in this way. The applicants, who are husband and wife, trade as R. & D. Transport, and carry on business as haulage contractors at Radcliffe, in the county of Lancaster. On or before Mar. 9, 1937, one Frank Thornley, who has since died, was carrying on business as a haulage contractor, and was the holder of an " A " licence under the Act of 1933, granted by the appropriate licensing authority. By that licence, he was authorised to use a particular vehicle for a period ending on Apr. 30, 1938. Thornley died on Mar. 9, 1937, and letters of administration were granted to his widow. She thereupon made an application to the licensing authority for an " A " licence, which was granted to her under the Act, which authorised her to use that same vehicle for the duration of the unexpired portion of the term. By a letter of Apr. 16, 1937, from the Commercial Motor Users Association, written on behalf of the applicants, the licensing authority was informed that Beatrice Thornley was negotiating with them for the sale of the business, and further that, when the application of Mrs. Thornley had been granted, an application would be made by the applicants for an "A" licence to use that particular vehicle, and an application was made in due course. On May 24, 1937, an application was made, and there was produced, and filed with the appropriate licensing authority, a preliminary agreement between Mrs. Thornley and A the applicants, showing the particulars of the turnover of the business while it was carried on by Thornley, two letters from customers saying that they would employ the applicants, and certain particulars relating to the traffic and customers of the vendor, also a statement that the business was then being managed by Richard Woodward, one of the B partners, because Mrs. Thornley was not possessed of the necessary knowledge or experience to manage it herself. On June 3, 1937, there was an assignment dated June 1, 1937, between Mrs. Beatrice Thornley of the one part and the applicants of the other. That was sent to the licensing authority on June 4, together with four other letters from C customers of the vendor to the effect that, if the application were granted, they would employ the applicants instead of the vendor. On June 24, 1937, another letter was written on behalf of the applicants, and there was sent to the licensing authority a full list of the vendor's customers, and information that the vehicle then authorised to be used by the D applicants was fully occupied and could not take any further traffic. On June 29, there was forwarded a list of money earned by them. On July 10, 1937, a letter was written by the clerk to the licensing authority to the applicants in these terms:

> I am directed by the licensing authority for the North Western Traffic Area to E refer to your application for a class "A" public carrier's licence in substitution of that previously granted to Mrs. B. Thornley under reference 33993/2 A, and to inform you that after consideration of the information before him the licensing authority regrets that he is unable to deal with the matter under the terms of sect. 11 (3) (*b*) of the Act. In such circumstances you are requested to state whether you desire to withdraw the application or whether you desire that it shall be published in Part I of "Applications and Decisions" as for a new licence in accordance with F the prescribed procedure.

That was answered on behalf of the applicants, their letter saying that they were at a loss to understand why the licensing authority was unable to deal with the matter. In reply to that letter, on behalf of the licensing authority, the clerk writes on Aug. 9, 1937:

> G I am directed to refer to your letter dated July 30, 1937, and to state that whilst the licensing authority is of the opinion that the application submitted by Messrs. R. & D. Transport is one to which the provisions of sect. 11 (3) (*b*) of the Act can be taken to apply he considers that in order properly to exercise his discretion under sect. 6 of the Act it will be necessary to publish the application in Part I of "Applications and Decisions" and subsequently to consider the application at a public inquiry. In order that your client may have an opportunity to consider the matter H steps will not be taken to publish the application within seven days from the date of this letter.

The applicants take the view that, on the true construction of the Act, which I must refer to in a moment, the licensing authority has no power to do that which they are seeking to do, namely, to publish the application in "Applications and Decisions," and to hold a public inquiry.

Their view is that, this application being only for a transfer, as it were, of a licence with regard to a particular vehicle, which they, the applicants, are purchasing as part of the business of the vendor—the vendor having had a licence for that particular vehicle which has still an unexpired term to go—in those circumstances, they are entitled to an " A " licence for the remainder only of the period which has still to run with regard A to that particular vehicle, and that, although the applicants admit that the licensing authority may grant or refuse the application, the applicants contend that, on the true construction of the Act, the licensing authority has no power to advertise the application, which may have the result of inviting opposition, nor to hold the inquiry before deciding whether B or not they will grant the application. Whether that be the true view or not, my judgment turns simply on the construction of this Act. I do not think that it is for me to say whether, in this particular case, the licensing authority ought or ought not to refuse to grant the licence. I am concerned to see whether, under the terms of the Act, the licensing C authority have gone outside their power in saying that they are proposing to publish this application and to hold an inquiry before either granting or refusing the application.

In order to solve that question, it is necessary to look at the terms of the Act of 1933. The Act is one which is : D

> An Act to make provision for regulating the carriage of goods on roads by motor vehicles and for controlling the use of vehicles on certain roads ; to amend certain provisions of the Road Traffic Act, 1930 ; to amend the law relating to railways and to make provision for constituting a council to advise on questions in connection with the means of, and facilities for, transport. . . .

Part I of the Act deals with road traffic in connection with goods vehicles. E Sect. 1 provides :

> (1) Subject to the provisions of this part of this Act, no person shall use a goods vehicle on a road for the carriage of goods (*a*) for hire or reward ; or (*b*) for or in connection with any trade or business carried on by him, except under a licence.

Then by sect. 1 (2) a goods vehicle is defined, and by subsects. (3) and (4) F there is a provision made for a vehicle which is under a hire-purchase arrangement. I do not think that it is necessary for me to deal further with that, but there are three classes of licence which are provided for by sect. 2 of the Act: public carriers' licences, limited carriers' licences, and private carriers' licences. In this case, the licence which I am G considering is an " A " licence, a public carrier's licence which entitles the holder, under sect. 2 (2) of the Act :

> to use the authorised vehicles for the carriage of goods for hire or reward, or for the carriage of goods for or in connection with his business as a carrier of goods, whether by road transport or any other kind of transport. . . .

H

It is not necessary to go into the other licences. It is enough to say that a " B " licence permits the holder to carry goods in connection with the carrying on of his own trade or business, and that a " C " licence is a licence to carry the holder's own goods. That is to say, large shops and businesses which deliver in various parts of the country must have a

"C" licence before they can lawfully send their vehicles out on the roads to deliver goods. Sect. 3 provides for the duration of the licences, which, in the case of an "A" licence, is to be for 2 years. Sect. 4 provides for the constitution of the licensing authority. I need not refer to that. Sect. 5 is the procedure on application for licences, and the applicant has to submit a statement in the prescribed form containing certain particulars. Then sect. 6 is a little important for this purpose. That is a section which gives the licensing authority discretion as to the granting or refusal of licences. It provides:

> (1) Subject to the provisions of the next succeeding section, the licensing authority (*a*) on an application for an "A" licence or for a "B" licence, shall have full power in his discretion either to grant or to refuse the application, or to grant a licence in respect of motor vehicles other than those of which particulars were contained in the application, or in respect of motor vehicles or trailers less in number than, or differing in type from, those for the use of which authorisation was applied for. . .

Then subsect. (2) provides:

> The licensing authority in exercising his discretion shall have regard primarily to the interests of the public generally, including those of persons requiring, as well as those of persons providing, facilities for transport, and, in particular, shall have regard in the case of an application for an "A" licence or for a "B" licence: (*a*) where the applicant is the holder of an existing licence of the same class, to the extent to which he is authorised to use goods vehicles thereunder for the carriage of goods for hire or reward; (*b*) to the previous conduct of the applicant in the capacity of a carrier of goods; (*c*) to the number and type of vehicles proposed to be used under the licence; (*d*) in determining the number of vehicles to be authorised, to the need for providing for occasions when vehicles are withdrawn from service for overhaul or repair.

I do not think I need refer to that further. Then sect. 7 provides special provisions as to certain applications, and then I come to sect. 11, which really gives rise to the question here. That section is in these terms:

> (1) The licensing authority shall publish in the prescribed manner notice of an application to which this section applies specifying the time within which, and the manner in which, objections may be made to the grant of the application. (2) It shall be the duty of the licensing authority, on an application to which this section applies, to take into consideration any objections to the application which may be made by persons who are already providing facilities, whether by means of road transport or any other kind of transport, for the carriage of goods for hire or reward in the district, or between the places, which the applicant intends to serve, on the ground that suitable transport facilities in that district, or between those places, are or, if the application were granted, would be, either generally or in respect of any particular type of vehicles, in excess of requirements, or on the ground that any of the conditions of a licence held by the applicant has not been complied with: Provided that on an application for the grant or variation of an "A" licence, the licensing authority shall not be bound to take into consideration objections made by a person who holds a "B" licence and does not also hold an "A" licence. (3) This section shall apply to every application for the grant for the currency period of an "A" licence or of a "B" licence, or for the variation of such a licence by a direction that additional vehicles shall be specified therein or that the maximum number of motor vehicles or of trailers specified in the licence in pursuance of sect. 2 (6) (*b*) and (*c*) respectively of this Act shall be increased, or, in the case of a "B" licence, that the district specified in the licence within which, or the places so specified between which, the vehicles can be used for the carriage of goods for hire or reward shall be varied or extended, not being (*a*) an application which the licensing authority is bound to grant; or (*b*) an application for a licence to expire not later than an existing licence under which the vehicles to which the application relates are authorised to be used for the purposes of a business which the applicant has acquired or intends to acquire; or (*c*) an application as respects which the licensing authority is of opinion that, having regard to its

> trivial character it is not necessary that any opportunity should be given for objection. (4) This section shall apply to every application under sect. 3 (3) of this Act for a short-term "A" licence or short-term "B" licence, unless the licensing authority is of opinion either (*a*) that, having regard to the trivial nature of the application, it is not necessary that any opportunity should be given for objection; or (*b*) that the application has been made with reasonable expedition and that the demand for the use of the vehicles to be authorised under the licence is so urgent as to render compliance with the requirements of this section impracticable. (5) The licensing authority may hold such inquiries as he thinks necessary for the proper exercise of his functions under this Act.

I do not know that it is necessary to refer to anything further in the Act. Sect. 13 provides for revoking or suspending licences. I do not think that there is anything else which assists me in determining the question which I have to determine. There is nothing in the Act which in terms provides for the transfer of a licence from one person to another, as in the case, for instance, of the licensing laws for the sale of liquor, but what is said here is that this is an application for a licence, to expire not later than the existing licence under which the application is made, to use a vehicle for the purpose of the business which the applicants have acquired, or intend to acquire. That being so, this is not an application to which sect. 11 applies at all, and, although the licensing authority may refuse or may grant the application, the licensing authority has no power to do more than that, and cannot publish the application, cannot hold an inquiry if it thinks fit, and must either refuse or accede to the application without more ado. The question is, is that the right view of the Act ? The only power to hold an inquiry, so far as I am aware, expressly given under this Act, is the power given by sect. 11 (5), but it is to be noticed that the terms of that subsection provide this :

> The licensing authority may hold such inquiries as he thinks necessary for the proper exercise of his functions under this Act.

When an application is made, such as in this case, the licensing authority has to be satisfied of various matters, including those matters to which I have already made reference in para. 6. It also has to satisfy itself that the application is one which is not within sect. 11, because it is within the exceptions which are to be found in sect. 11 (3) (*b*). That is to say, sect. 11 does not apply only if in this particular case it is an application for a licence to expire not later than the existing licence under which the vehicle to which the application relates is authorised to be used for the purpose of the business which the applicants have acquired or intend to acquire. It is plain that, in order to get out of sect. 11, it is necessary to satisfy the licensing authority that the application relates to a vehicle to be used for the purpose of a business which the applicants have acquired or intend to acquire. That pre-supposes that the person from whom the vehicle or vehicles have been acquired was, at the time of acquisition, carrying on a business. In my judgment, it is plain that, if the vendors of the vehicle, although they had a business at the time when they made an application for the "A" licence, had ceased to carry on that business at the time of the sale of the vehicles, that would not be within sect. 11 (3) (*b*). Therefore the licensing authority has to be satisfied, for instance, in that regard that the case is one which comes within the exception contained in sect. 11 (3) (*b*), and, for that purpose, if it is necessary to satisfy themselves on those facts, I should have thought it was plain that the licensing authority is entitled to hold such inquiry as he thinks necessary for the proper execution of his functions under the Act. In order to hold an inquiry, no doubt it is necessary and proper that the application should be published, in order that any persons who desire to come in and deal with the matter should have notice of it, and give the applicant an opportunity of hearing any opposition there may be, and so far as he can, of meeting it, in order that the licensing authority may come to a proper decision in the matter. I myself am unable to say that the licensing authority has no power to hold an inquiry in a case of this kind if it thinks it necessary to do so. I am not saying that the licensing authority is bound to hold an inquiry. It is a matter of the discretion of the licensing authority. But, if the licensing authority, having regard to the details in each case, thinks it right to hold an inquiry, then, in my judgment, there is nothing whatever in this Act which in any sense prevents such an inquiry from being held, and, further, there is, in my judgment, in sect. 11 (5) an express authority to the licensing authority to hold an inquiry, if it is thought necessary for the purpose of exercising the licensing authority's functions under the Act. I am unable to accept the contention of the applicants here that there is no power in the licensing authority either to publish the application or to hold the inquiry, if it thinks fit so to do.

I am glad to find that in this regard I have come to the same conclusion as that which was come to by the Road and Rail Traffic Appeal Tribunal in *Ex-Army Transport, Ltd.* v. *Diamond & Co., Ltd.* (1). That decision, of course, is not in any sense binding upon me. It is, at any rate, some satisfaction to find that the conclusion to which I have come is in accordance with the conclusion to which that tribunal came. Accordingly, in my judgment, all I can do on this summons is to dismiss it with costs.

Summons dismissed with costs.

Solicitors: *Joynson-Hicks & Co.*, agents for *Henry Backhouse & Son*, Blackburn (for the applicants); *Treasury Solicitor* (for the respondent).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

Distinguished. In re
BAILEY
[1951] 1 Ch. 407

Re FOX'S ESTATE, DAWES *v.* DRUITT, PHŒNIX ASSURANCE CO., LTD. *v.* FOX.

[Court of Appeal (Sir Wilfrid Greene, M.R., Romer and MacKinnon, L.JJ.), **November 30, December 1, 1937.**]

Will—Construction—Necessary implication—Ultimate gift over upon lapse by death—Gift failing by reason of donee never having had any children—Rule in Jones v. Westcomb.

Testator gave all his "substance" to his executors upon trust as to one quarter for his daughter F. S. for her separate use, as to one other quarter for his daughter A. C. for her sole use for life, and thereafter for her children if she leave any equally, as to another quarter for the children of his deceased son G. J. equally, and as to the last quarter for W. S. and T. S. The testator declared that the benefits under his will should become vested on the coming of age of the legatee, and that any legacy which by the death of any person should lapse should go to F. S. A. C. survived the testator but died without having ever had any children, and her share lapsed for that reason. The question raised was whether the gift over to F. S. upon lapse by reason of the death of any person took effect in these circumstances:—

Held: (i) the one quarter given to A. C. did not lapse by the death of any person, but for the reason that A. C. had never had any children.

(ii) the gift over took effect under the rule in *Jones* v. *Westcomb* (1) that, by necessary implication, the testator must be taken to have made provision for the event which had happened as well as for the lapse by reason of the death of any person.

(iii) "Lapse" in this will did not refer only to the failure of a gift by reason of the death of a legatee in the testator's lifetime.

[EDITORIAL NOTE. Under the rule in *Jones* v. *Westcomb* (1), if an ultimate gift is made to take effect upon the failure of a particular gift in a particular manner, then it may take effect upon the failure of that gift in another manner provided the court is of opinion that the meaning of the testator was to include failure in that manner. In the present case it was argued that lapse must necessarily refer to death in the testator's lifetime, but this view was rejected by the court, as this was a will couched in homely and non-technical terms.

For the Rule in Jones *v.* Westcomb, see HALSBURY, 1st Edn., Vol. 28, Wills, pp. 803-805, paras. 1453, 1454; and for Cases, see DIGEST, Vol. 44, pp. 1172-1182, Nos. 10148-10218.]

Case referred to:

(1) *Jones* v. *Westcomb* (1711), Prec. Ch. 316; 44 Digest 1175, *10165*.

Appeal of the plaintiffs, the Phœnix Assurance Co., Ltd., from an order of Bennett, J., made on July 13, 1937. The will and the facts are fully set out in the judgment of Sir Wilfrid Greene, M.R.

R. F. Roxburgh, K.C., and *R. H. Hodge* for the appellants.

Andrew Clark for the respondent, Sarah Hilda Fox.

Sir Wilfrid Greene, M.R.: The testator in this case, George Fox, died on Nov. 19, 1878, having made a will dated Feb. 18, 1873. His estate is the subject of administration proceedings, commenced in the year 1881, and the present appeal arises out of a petition presented by the assignees of one of the beneficiaries named in his will—namely, his daughter Fanny Sarah—to have transferred and paid out of court

certain investments and cash standing to the credit of a particular account. That account is the account of the share of the plaintiff, Anna Charlotte Perry, "and the persons entitled after her death." Anna Charlotte Perry was another daughter of the testator. The question arises as to whether or not Fanny Sarah, and, through her, the
A present appellants, were the persons entitled to Mrs. Perry's share after her death. BENNETT, J., held that the appellants were not so entitled, and that, in the events which had happened, upon the true construction of the will, there was an intestacy as to that share. The will is in certain important respects couched in homely and non-technical language, and
B I think that that circumstance is to be borne in mind in considering the phrases used by the testator. The will is very short. I will read the relevant portions of it :

> I give to my executors all my substance upon trust as to one fourth part thereof for my daughter Fanny Sarah Fox for her separate use as to one other fourth part
> C for my daughter Anna Charlotte Perry for her sole use for her life, and after her decease for her children if she shall leave children equally as to one other fourth part for the children of my deceased son George John Fox in equal shares and as to the remainder one fourth part for Thomas William Spinney and Tiny Spinney now living with me and I declare that benefit hereunder shall become vested on the coming of age of the legatee and that any legacy which by the death of any person shall lapse shall go to my said daughter Fanny Sarah.

D Anna Charlotte Perry died without ever having had issue on Feb. 8, 1928. The property in question consisted to a considerable extent of real estate. Accordingly, the representative of the testator's heir-at-law, for whom Mr. Andrew Clark appeared, is a party to the petition to argue for an intestacy. The question arises under the last paragraph
E which I have read : "and that any legacy which by the death of any person shall lapse shall go to my said daughter Fanny Sarah." In point of fact, the legacy of the one quarter in which Mrs. Perry had a life interest failed to take effect, not owing to the death of her children, but owing to the circumstance that she never had any.

F BENNETT, J., held that, upon the true construction of this will, the testator has not in terms provided for the event which actually happened ; and he further held that it was not possible, upon the true construction of this will, to apply the rule commonly known as the rule in *Jones* v. *Westcomb* (1), to which I shall refer presently.

G The first thing to do is to construe the will. It is argued by Mr. Roxburgh, on behalf of the appellants, that, construing the actual language used, the testator has expressly provided for the event which happened. He puts his argument in this way. He says that the words "any legacy" in the sentence to which I have referred, when taken in
H reference to Mrs. Perry's one quarter, mean that one quarter ; and he says that that one quarter has lapsed by the death of Mrs. Perry, and that, accordingly, according to the terms of the will, it then went to the daughter Fanny Sarah. I am unable to agree with that construction of those words. It seems to me that, assuming the words "any legacy" to refer, not to the legacy to the children of Mrs. Perry, but to the one

quarter *simpliciter*, it is quite impossible to say that that has lapsed by the death of Mrs. Perry. Mrs. Perry's death, no doubt, was the occasion upon which the lapse took place; but it was not the cause of the lapse. The cause of the lapse of that share was that no children had ever come into existence to take on the death of Mrs. Perry. It seems to me that it would be straining the language of this paragraph to an extent which A is not permissible if the language were construed as in terms and expressly referring to the event which has happened. The testator therefore has not in that paragraph made express provision for the event which has happened.

The next question is whether it is possible or right to apply the rule B in *Jones* v. *Westcomb* (1) to the present case. The rule in *Jones* v. *Westcomb* (1) is in substance to this effect. Where a testator has provided for the determination of an estate in any of two or more events, and has then given a gift over expressly to take place in one only of those events, the court will, in the absence of any indication to the contrary, imply, by C way of necessary implication, an intention on the part of the testator that the gift over shall take effect, not merely in the specified event, but on the happening of any of the events which were to determine the previous estate. That is the ordinary case of the application of the rule. It is to be remembered that that rule does not depend upon the existence D in the will of some particular word or phrase, which, as a matter of construction, produces that result. It is dependent upon the necessary implication of a provision to that effect, in order to carry out what must have been the intention of the testator. It is expressed very concisely in JARMAN ON WILLS, 7th Edn., Vol. 3, p. 2131: E

> The conclusion that such was the actual intention has been deemed to amount to what the law denominates a necessary implication.

Jones v. *Westcomb* (1) itself forms a very good example of the operation of the rule. That was a case where a testator bequeathed a term of years to his wife for life, and after her death to the child she was *enceinte* F with at the date of the will, and, if such child should die before attaining the age of 21, then one third part to his wife, and two third parts to other persons. The only event in which the property was to be disposed of, in that case, was on the death of that child before 21. In point of fact, the wife was not *enceinte* at all. It was held, nevertheless, that G the bequest took effect. It was clear there that, the testator having intended that, in the event of death under 21, the gift over should take effect, it was a matter of necessary implication to impute to him the intention that it should equally take effect if the child never came into existence at all. H

In the present case, the argument on behalf of the appellants is put in this way. It is said that, in the case of the quarter in which Mrs. Perry takes a life interest, there is a gift after her death to her children, if she shall leave children, equally, and that the gift over provides, not for the event of her never having had children, which was the event which happened, but only for the event of the death of those children at such a time that they would not take, and that might take place either by the death of all of them in her lifetime, or by the death of all of them under 21. In that case there would be no one to take, and the gift over, it is argued, would take effect. But the third event, which A is an *a fortiori* case (if one is looking into the presumed intention of the testator), of there never being any children at all, not being expressly provided for in this paragraph, must nevertheless be by necessary implication introduced into the will. I do not think that there was any real dispute that, if the construction which Mr. Roxburgh wishes us to B put upon that concluding paragraph is the correct one, the rule would apply. Indeed, Mr. Andrew Clark really did not argue that it would not apply.

The real argument which was put forward here was to this effect: that, having regard to the language used in this sentence, it is not legiti- C mate to say that, by necessary implication, the contingency of no children having come into existence must be imported. The ground for that argument is that the testator, by the phrase " by the death of any person shall lapse," has indicated one event, and one event only, upon which the gift over is to take effect—namely, lapse in the strict sense by the D death of the legatee during the testator's lifetime. I am unable to take the view that the word " lapse " has in this will such a strict meaning. I cannot accept the proposition that in this will the words " death of any person " are to be construed as referring, and referring only, to the death in the lifetime of the testator. The testator has not said " by E the death in my lifetime," but simply " by the death "; and his dispositions include not merely immediate gifts, with reference to which the argument is a forcible one, but also a settled legacy. Further, the sentence comes immediately after a provision to the effect that vesting is to take place only on the coming of age of the legatee. Having regard F to all these circumstances, particularly to the fact that the testator has not added any point of time to the words " the death," I have come to the conclusion that the words " by the death of any person " there include the case of death not merely in the lifetime of the testator, but before the legacy vests in possession. If that be the true meaning, G it seems to me that the word " lapse " cannot be construed in its strict technical sense.

In connection with this legacy, there are really four possible cases. There is the case where Mrs. Perry and all her children die in the lifetime of the testator. That would be a case of lapse in the strict technical H sense. The next case is the death of the children of Mrs. Perry in her lifetime, in which case there would be no children to take. The next case is the death of all the children before they attain the age of 21. Neither of those latter cases would be lapses in the strictest sense; but, on the true construction of this will, reading " death " as being not confined to death during the testator's lifetime, they would be properly treated as falling under the description imported by the word " lapse." The last case is the failure of the gift to take effect by reason of the fact that no such children were born. It seems to me that, on the language of this will, the language is apt to cover that case as well as the other three. Accordingly, I am unable to take the view that there is something technical in the nature of this language which prevents the application of the rule in *Jones* v. *Westcomb* (1). But I go further than that, because, even if the phrase " by the death of any person shall lapse " is, on its true construction, to be confined to the case of death in the lifetime of the testator, it appears to me that that would be a case, and a typical case, for the application of the rule, because the testator, having made provision for the event on which the children are to take —namely, if Mrs. Perry leaves children—has in the gift over provided for only one of the events upon which that gift over will fail to take effect—namely, the death of those children in the lifetime of the testator. Accordingly, it seems to me that that brings the case within the scope of the rule. This is a case, in my opinion, where, by necessary implication, there is to be imported into this gift over an intention on the part of the testator that it shall take effect, not merely in the event expressly provided for, but in the further event of no children coming into existence at all. The result is that the appeal succeeds, and there must be an appropriate declaration to that effect.

Romer, L.J. : I have come to the same conclusion. As to the first point raised by Mr. Roxburgh on behalf of the appellants, I agree with Sir Wilfrid Greene, M.R., that it is quite impossible to give effect to it. The failure of the disposition of one fourth share of the testator's estate, given to Mrs. Perry for life, after her death, is not caused by the death of Mrs. Perry, but by the failure of issue—that is to say, by the fact that she had no children at all.

As regards the second point, however, I think that Mr. Roxburgh is right. I do not propose to read through the will again. It is sufficient for me to say that I agree with Sir Wilfrid Greene, M.R., for the reasons that he has given, that the word " death " and the word " lapse " have the meaning he has attributed to them in this will. That being so, the effect of this clause dealing with lapse, so far as the one fourth given to Mrs. Perry for life is concerned, is this. The testator has declared that, in the event of the gift of the one fourth after the death of Mrs. Perry failing to take effect owing to the death of all her children in the testator's lifetime, or in her lifetime, or after her death and under the age of 21 years, that one fourth share, after the death of Mrs. Perry, should go to his daughter Fanny Sarah. That being so, it appears to me that the principle applied in the case of *Jones* v. *Westcomb* (1) comes properly into operation. That principle is stated in this way in Theobald on Wills, 8th Edn., p. 739, and I think it is rightly stated there :

> There is, however, a class of case where, though the exact event upon which the

> gift over is to take effect does not happen, the gift over must *a fortiori* have been intended to take effect in the event which happens.

The principle is applicable, therefore, only in those cases where the court, looking at all the relevant circumstances of the case, including, of course, the will itself, comes to the conclusion that the testator must *a fortiori* have intended the disposition over to take effect in the event which has actually happened, although it is not the event which he has specified in his will as the one in which the gift over is to take effect. Looking at all the circumstances of this case, can anyone doubt for one moment that, if the testator had been asked what was to happen to this share of Mrs. Perry if she died without ever having had a child at all, the testator would have said: "*A fortiori* the share is to go to my daughter Fanny." I agree, therefore, that the appeal must succeed.

MACKINNON, L.J.: I agree. Mr. Clark was bold enough to argue that by allowing this appeal we should do violence to the express wishes of the testator. So far from thinking that, I am satisfied that the contrary conclusion would manifestly defeat the intention of the testator, which is clearly to be gathered from the whole of this short will.

Appeal allowed.

Solicitors: *Dawes & Sons* (for the appellants); *Lovell, Son & Pitfield* (for the respondent, Sarah Hilda Fox).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

DRIED MILK PRODUCTS, LTD. *v.* MILK MARKETING BOARD.

[KING'S BENCH DIVISION (Goddard, J.), **November 8, 1937.**]

Food—Marketing scheme—Fixing prices—Sterilised cream put into bottles—Price fixed for "tinned cream"—Whether applicable to sterilised cream in bottles.

The Milk Marketing Board had statutory power to fix the prices for milk by reference to the different purposes for which the producers sold the milk. It fixed a price for milk manufactured into fresh cream, tinned cream, and milk manufactured into other products. It did not fix any price for sterilised cream as such, nor for bottled cream. Milk was sold to be manufactured into sterilised cream in bottles, and a dispute arose as to the price applicable:—

HELD: tinned cream referred to sterilised cream only, and the price for milk to be manufactured into sterilised cream must be the same, irrespective of the container into which it was to be put. The price fixed for tinned cream therefore applied to sterilised cream in bottles also.

[EDITORIAL NOTE. In settling the prices to be paid for milk, the Board fixed a price to be paid for milk manufactured into tinned cream. The prices were to be fixed with reference to the products into which the milk was to be manufactured, and it is here held that tinned cream is not itself a product, it being established that tinned cream was meant as a trade term for sterilised cream. The product is sterilised cream, and the price fixed with respect to tinned cream therefore applied to sterilised cream put into bottles.

As to Milk Marketing Scheme, see HALSBURY, Hailsham Edn., Supp., Agriculture, para. 643; and for Cases, see DIGEST, Supp., Food and Drugs, Nos. 476g-476k.]

Award stated in the form of a special case under the Arbitration Act, 1934, s. 9 (1) (*b*), for the decision of the court. The only question which arose for determination in the arbitration was whether the right of the claimants to a rebate in respect of the milk purchased from the suppliers was a right to the rebate in respect of "milk manufactured into tinned cream" or to that in respect of "milk manufactured into other products" according to the classification of purposes for which the milk is to be used given in the schedule to the standard form of contract.

Hubert Hull for the claimants.

L. C. Graham-Dixon for the respondents.

Goddard, J.: The Act and order constituting the Milk Marketing Board gave it power to prescribe the description of milk to be sold: the prices at, below, or above which, the person to, or through the agency of whom, and the terms on which, milk, or any description or quantity of milk, might be sold. By the Milk Act, 1934, s. 12 (2), the powers of the Board were extended, so that they could fix different prices by reference to the different purposes for which the producers sold the milk.

A contract was entered into on Sept. 11, 1934, by the farmer who agreed to sell the milk, the claimants in this case, who were the purchasers, and the Milk Marketing Board. Under the contract, a notional price was agreed to be paid at the rate of 1*s.* 5*d.* per gallon, with a provision that the producer was to receive a rebate according to the purpose for which the milk was to be used. The second schedule to the contract sets out the various prices by reference to the products—namely, cheese, butter, soft curd cheese, and cream cheese, condensed milk for home consumption and export, milk powder, fresh cream, tinned cream, ice cream, chocolate cream, sterilised milk for export and milk manufactured into other products. The material products in the present case are "milk manufactured into tinned cream" and "milk manufactured into other products." For the purposes of the arbitration, it was agreed that part of the milk was to be treated as having been subjected to the processes for the production of sterilised cream in bottles. No other question arose for determination in the arbitration, except the question of whether the right of the claimants to a rebate in respect of such part of the milk was a right in respect of "milk manufactured into tinned cream" or in respect of "milk manufactured into other products." The cream referred to is only sterilised cream. There is no reference to fresh cream put into tins. When one speaks of tinned sterilised cream, what one means is sterilised cream put into tins. "Tinned cream" is a convenient expression for indicating cream put into tins. It is the same thing, whether it is put into tins or put into anything else. Sterilised cream is a product which is the result of a manufacturing process. The process is described in this way. It is said that the milk which is received from various suppliers is bulked, so that it becomes impossible to attribute to the milk of any one supplier any part of the cream which is finally produced. That fact does not weigh with me very much. Although commercially it would be extremely difficult to see that the milk received from different suppliers was kept apart, yet it might not be impossible to put some into bottles and some into tins. The milk is then passed through separators so as to produce cream containing about 23 per cent. of butter fat. The cream is then passed through another process, known as stabilisation. It is next heated, then cooled, and, after that, is passed through a machine known as a homogeniser. When it has been subjected to all these processes, part of it is put into tins and part into bottles. After being hermetically sealed, the tins and the bottles are put (not both at the same time, but separately) into a sterilising chamber, and steam-heat in the chamber sterilises the contents of the tins and of the bottles. The case sets out the agreement between the parties in these terms :

> Both parties agreed that the phrase "tinned cream" in the second schedule was meant to apply to sterilised cream, but the parties are at variance on the point whether it does or does not cover sterilised cream which when it is sterilised and sold is in a bottle and not in a tin.

It is not argued on behalf of the Milk Marketing Board that no price is fixed for sterilised cream, but it is said that no price is fixed for sterilised cream which goes into bottles. Bottled cream is not in itself a product. Cream can be called "tinned" if put in a tin. If it is called "bottled," it means that the cream is put into a bottle. I confess I do not see how the cream is a different product because it is put into a different container, even though the last process, sterilisation, is done after the milk is put into the particular container. Once it is clear that the parties intended that tinned cream should be read as referring to sterilised cream, which is the product, the price is fixed for it, whether it is in a tin or a bottle. The provision of a price with reference to the different containers would be *ultra vires*, because the Board has no power to fix such a price. The product is sterilised cream, and is the same whether it is put into a tin or into a bottle. I must therefore hold that the claimants are right, and I must answer the question in the special case by saying that the milk was milk manufactured into tinned cream. The claimants must be given the costs of this case.

Solicitors : *Reynolds, Sons & Gorst* (for the claimants) ; *Ellis & Fairbairn* (for the respondents).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

SHACKLOCK *v.* ETHORPE, LTD.

[King's Bench Division (Greaves-Lord, J.), **November 18, 19, 25, 26, 29, 1937.]**

Inns and Innkeepers—Limitation of liability—Exhibition of copy of Act—Conspicuous part of hall or entrance—Innkeepers' Liability Act, 1863 (*c.* 41), *ss.* 1, 3.

An innkeeper is required by the Innkeepers' Liability Act, 1863, s. 3, to exhibit a copy of sect. 1 thereof in a conspicuous part of the hall or entrance to the inn. An inn was entered by a vestibule which led to a lounge, and from this lounge a corridor, in which was the reception office, led to the staircase and dining-room of the hotel. The notice was exhibited in this corridor above a chocolate case some 6 ft. from the ground :—

Held : the notice was not exhibited in compliance with the Act in a conspicuous part of the hall or entrance to the inn.

[**EDITORIAL NOTE.** The exhibition of the notice referred to in this case is required for the limitation of the innkeeper's liability in cases of loss. The present case is reported solely on the point of the place where the notice is to be exhibited. The Act has a very definite requirement in this respect, which must be observed.

As to Exhibition of Copy of Innkeepers' Liability Act, see HALSBURY, Hailsham Edn., Vol. 18, pp. 158, 159, para. 216 ; and for Cases, see DIGEST, Vol. 29, pp. 16, 17, Nos. 205-210.]

Action for damages in respect of the theft of jewellery from the defendants' inn. The case is only reported upon the point as to the place of the exhibition of the notice under the Innkeepers' Liability Act, 1863. The material facts are fully set out in the judgment.

Gilbert Beyfus, K.C., and *Sylvester Gates* for the plaintiff.

N. L. C. Macaskie, K.C., and *Montague Berryman* for the defendants.

Greaves-Lord, J. : In this case, Frances Ada Shacklock sues in respect of her personal estate. Now, that title is unnecessary, because, since the action was started, she has divorced her husband, and is now suing as a *feme sole*. She brings this action because, in Sept., 1935, she was a guest at an hotel or inn situate at Gerrard's Cross in the county of Buckinghamshire, and, during the time that she was there, there was stolen, and it is common ground that there was stolen, from a dressing-case in her bedroom a quantity of jewellery, in respect of which she claims £602. She had stayed at this same hotel on several occasions before ; twice, at any rate, in 1934, and once before Sept., 1935. The defence which is set up is that the defendants, who are innkeepers, claim the limitation to their liability given by the Innkeepers' Liability Act, 1863, s. 1, and say that, in the alternative, the plaintiff herself was guilty of contributory negligence, or of negligence which contributed to the loss, in the way in which she kept this jewellery. [His Lordship dealt with the question of negligence.]

There arises for my decision another point, which would have the effect, if I found in favour of the plaintiff, of limiting the liability of the innkeeper to £30, in accordance with the Innkeepers' Liability Act. In order that the limitation of liability may take effect, it is necessary under the Innkeepers' Liability Act, 1863, s. 3, that :

> Every innkeeper shall cause at least one copy of sect. 1 of this Act, printed in plain type, to be exhibited in a conspicuous part of the hall or entrance to his inn...

I do not think that anybody can complain of the way in which this notice is printed. There is no question about it being printed in plain type, so that it can be read. Then the requirement is: "This notice shall be exhibited in a conspicuous part of the hall or entrance to the inn." Now, that does not say—and I must bear this in mind—that it shall be exhibited in the most conspicuous part of the hall or entrance. It is sufficient if it is exhibited in a conspicuous part of the hall or entrance.

What is said to be the hall here is a passage about 4 ft. wide, leading from one lounge, which on the other side is bounded by the vestibule or entrance to the hotel, to another lounge. I do not think that there can be any doubt at all within the decided cases that, if this notice had been exhibited in the vestibule, and the position of those in charge of the hotel had been to treat the vestibule as the hall, provided that the part of the vestibule it was exhibited in had been the conspicuous part, such exhibition of the notice would have operated to limit the liability of the innkeeper. However, I am left here in considerable doubt as to whether the place where this notice was exhibited ever formed part of the hall in any way. One enters the hotel by a vestibule. On getting through that vestibule, one proceeds into a lounge where people are either standing or sitting about, either for conversational purposes or for the purpose of procuring drink, or for general social amenities of the hotel. On the other side of that lounge is a place between the lounge and this passage which forms part of a corridor leading along the hotel. A part of it goes on the right to lavatories, to an exit on to the garden, in one case, and, on the other hand, to the office or sitting-room of the manageress, and beyond that to a lounge which is called the "residents' lounge." At any rate, that corridor leads, I think, to a service window, and, further, to another lounge. On one side of that corridor there is a small room, used, at the time the plaintiff was there, as the reception office and as what is known as a "dispense," which has now to be used without the word "bar," which it really is, because that would not satisfy the licensing authority. That, as I say, is really a window looking out into this corridor. Between that reception office and other parts of this corridor is the way to the staircase, and also the way to the dining-room. In addition to leading to the dining-room, this same way leads, on the one hand, to a service room, and, on the other hand, to an outlet to the garden, where, apparently, in the summer time guests go and are supplied with drink and refreshments. In this same passage, there is, on the right-hand side, a radiator; then there is an exhibition case in which chocolates are exhibited, and that is some 12 ins. out from the wall, and some 5 ft. 8 ins. in height. Then, beyond that, on the right-hand side, is the door to the ladies' lavatory, and beyond that, I think, at least two hat-racks.

It is in that passage that the innkeeper has chosen to exhibit his notice, which he says is the notice required by sect. 3 of the Innkeepers' Liability Act. The place where he thinks fit to exhibit it is a point on the wall above the glass case which is used for the exhibition of chocolate. A
Whether or not that would ever be said to be a conspicuous part of that place in which it is exhibited I do not know, except that I cannot help pointing out that, in the position in which it was, if by the word "conspicuous" is to be meant "attractive," it looks rather as though it were put in the sort of place where anything is to be put that the inn- B
keeper wants to get rid of, or to get out of the way, because he puts it in, I should think, the last place in which anyone would be looking for a notice containing anything of importance. If that were put there, the effect upon the average visitor would be to make him say to himself : "I suppose that has some reference to the Innkeepers' Liability Act, and C
that is something of which the innkeeper does not want us to take too much notice."

What I am not satisfied about is—and this, after all, is the important point—that the place where it is exhibited can, by any stretch of imagination, be called a conspicuous part of the hall. If the hall consisted of all D
the various apartments, it might be said to form part of the entrance, but this would not be a conspicuous part of it at all. As I have said, it has to be a conspicuous part of that particular passage, but it is certainly not a conspicuous part of the hall or entrance as a whole, and, in my view, this point forms no part of the entrance to the inn, taken as a whole. It E
may very well be an entrance to certain parts of the premises, or a passage leading to parts of the premises, but it certainly, in my opinion, is no part of the entrance to the inn as a whole.

In those circumstances, I do not think that, having regard to the particular nature of the various places to which these odd passages lead, F
anyone can say that the combination of the whole of these passages and places can be said to be the hall or entrance to the inn. Taking the complete place as a whole, this notice is not exhibited in a conspicuous part of anything that may be taken as answering to the description "hall or entrance to the inn" as a whole. In my view, the innkeeper G
is not in this case entitled, by the existence of that notice where he has chosen to put it, to limit his liability.

Judgment for the plaintiff for £550 and costs.

Solicitors : *Vickress & Clare* (for the plaintiff) ; *Berrymans* (for the defendants). H

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

BARNES *v.* IRWELL VALLEY WATER BOARD.

[King's Bench Division, Manchester Michaelmas Assizes (Hon. S. O. Henn Collins, K.C., Commissioner of Assize), **December 2, 3, 1937.**]

Water Supply—Domestic purposes—Purity of supply—Pure while in mains—Water dissolving lead—Statutory duty—Common law duty to warn persons supplied.

The plaintiffs were supplied with water for domestic purposes by the defendant water board. It was proved that the water was pure so long as it was in iron pipes, but in its passage through lead pipes it dissolved lead and became poisonous. The only lead piping through which the supply passed was a length of 6 ft. before the stop-cock was reached, and the pipes upon the plaintiffs' premises. The plaintiffs, by drinking the water supplied, had contracted lead poisoning:—

Held: (i) the water board had fulfilled its statutory duty of supplying pure water.

(ii) the board had failed in its common law duty to warn the plaintiffs that the water, if passed through lead pipes, was likely to be injurious to the health of those drinking it unless proper precautions were taken.

[**EDITORIAL NOTE.** The difficulty that arose in respect of the water supplied was that, if it was allowed to remain in contact with lead for any length of time, it dissolved the lead and became poisonous. This effect could have been obviated by warning the users that, when the water was required for drinking or cooking purposes, a certain quantity should be first drawn off, but the water board gave no such warning They were, therefore, held to have neglected a common law duty to the consumer, though they had fulfilled their statutory duty.

As to Purity of Water Supply, see HALSBURY, 1st Edn., Vol. 28, Water Supply, pp. 299, 300, para. 552; and for Cases, see DIGEST, Vol. 43, p. 1078, Nos. 132-138.]

Cases referred to:

(1) *M'Alister* (*or Donoghue*) v. *Stevenson*, [1932] A.C. 562; Digest Supp.; 101 L.J.P.C. 119; 147 L.T. 281.

(2) *Heaven* v. *Pender* (1883), 11 Q.B.D. 503; 36 Digest 8, *9*; 52 L.J.Q.B. 702; 49 L.T. 357.

Action for damages in respect of lead poisoning alleged to be due to drinking the water supplied by the defendant board. The facts are fully stated in the judgment.

G. J. Lynskey, K.C., and *C. H. Spafford* for the plaintiffs.

D. P. Maxwell Fyfe, K.C., and *P. Redmond Barry* for the defendants

Hon. Henn Collins, K.C., Commissioner: I fully realise the importance of this case, but I do not feel that I shall form a better judgment upon it by thinking it over, because I have the authorities very clearly in my mind at the moment, and the facts are freshly before me. It is an action brought by William Barnes (who is and was at all material times the tenant of a licensed house called the Griffin Inn, Haslingden) and his wife in respect of lead poisoning, from which admittedly they suffered, and which they allege was brought about either by a breach of a statutory duty on the part of the defendants to supply pure and wholesome water, or by reason of the negligence of the defendants in supplying to the premises water which the defendants knew, or ought to have known, would or might become impregnated with lead to a dangerous degree, and in failing to warn the plaintiffs or either of them of the danger of using the water in the state in which it was delivered. It is admitted that both these plaintiffs suffered from lead poisoning, and it is also admitted that a possible cause of the lead A poisoning was the water they drank from their house supply. Another possible source of lead poisoning is suggested as being the beer. On the materials before me, I am satisfied that the substantial cause of their illness, and the only one which one may regard as being really important, was the lead poisoning by tapwater supply. I am led to that conclusion B not a little by the fact that Mrs. Barnes, who took no beer, was herself severely poisoned. Indeed, she was the more severely poisoned, although, of course, two persons having the same amount of poison may react very differently. Therefore, there is no great significance to be attached to the fact that one suffered more than the other. But the fact that C Mrs. Barnes did suffer from lead poisoning convinces me that the water, when it was taken from the house tap, was not pure and wholesome.

It is said, in the first place, and said with force, by Mr. Maxwell Fyfe, that the statutory duty of the defendants is limited to the delivery of pure and wholesome water at the point of delivery, which is conveniently, D I think, described as the stop-cock. Criticism has been directed to the fact that, whereas the water may be pure and wholesome when it leaves the iron pipe, it has to pass along 6 ft. or so of lead pipe before it gets to the stop-cock. It is said on the part of the plaintiffs that that passage of the water through that length of lead pipe will no doubt put into the E water a sufficient quantity of lead to make that small quantity of water unfit for use after, say, eight hours, and the suggestion is made that that fact ought to bring me to the conclusion that the water, as delivered by the defendants at the stop-cock, is not pure and wholesome. I am not prepared to take that step. In my view, it would be so generously F diluted, and would reach the consumer in such small doses, that the lead content would be tolerable, and it is not, in my view of the facts, unwholesome or impure, as delivered by the defendants at the stop-cock. But I am equally clear that it is delivered in a state of plumbo-solvency —i.e., capacity for taking up lead—which, if it has a length of lead pipe G to go through (particularly one such as that with which this house was supplied), would render it dangerous to health, and did in fact make it dangerous to health.

Have the defendants, in those circumstances, first of all satisfied their statutory duty? I think that they have. For the reasons I have H given, they have satisfied their statutory duty. But does that end the matter? In my opinion, it does not. It seems to me that they have a common law duty over and above that imposed upon them by the statute. That duty is very well expressed, I think, in *M'Alister* (*or Donoghue*) v. *Stevenson* (1), summarising that ancient classic *Heaven* v. *Pender* (2).

BRETT, M.R., put it, in *Heaven* v. *Pender* (2), in these words, at p. 509 :

> The proposition which these recognised cases suggest, and which is, therefore, to be deduced from them, is that whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.

I do not think that anybody has ever questioned that as a proposition of law, though there has been a good deal of research into the exact state of things which must arise in order to create the relation there indicated. We are not troubled, as it seems to me, in this case with any such difficulty. There is the direct supply by the defendants to the plaintiffs with knowledge and intention—the knowledge that the plaintiffs used it for domestic purposes, and the intention that they should. There is certainly a high degree of probability that the consumer will use lead pipes that are tin-lined. All that is abundantly known to the defendants. They know that, if they deliver to such a house water capable of absorbing a large and dangerous quantity of lead, untoward results are likely to follow.

I ask myself what, in those circumstances, is their duty ? I think that the only answer must be that they are bound to warn the consumer that he must take the necessary precautions. Whether that is to be done by putting in a different kind of pipe, or by the far simpler method of drawing off a sufficient quantity of water before taking what is to be used for cooking or drinking, I really am not concerned to say, because I am quite satisfied that these plaintiffs have received no warning of any kind. In my opinion, therefore, the defendants are guilty of the acts of negligence charged against them in the statement of claim, and, in that view, the defendants are responsible for the damage which the plaintiffs have respectively suffered. [His Lordship then considered the question of damages.]

Solicitors : *Barlow, Rowland & Co.* (for the plaintiffs) ; *Richard Moore* (for the defendants).

[*Reported by* M. D. CHORLTON, *Barrister-at-Law.*]

NOTE

ALLIED NEWSPAPERS, LTD. *v.* HINDSLEY (INSPECTOR OF TAXES).

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Romer and MacKinnon, L.JJ.), **December 8, 9, 1937.**]

An appeal from the judgment of LAWRENCE, J., reported [1937] 2 All E.R. 663, was dismissed, without the respondents being called upon.

Re COUNTY OF LONDON (STOKE NEWINGTON) HOUSING ORDER, 1936, APPLICATION OF STOCKER.

[King's Bench Division (du Parcq, J.), **November 24, 25, December 7, 1937.**]

Public Health—Housing—Provision of housing accommodation—Administrative county of London—Powers of London County Council—Housing Act, 1925 (*c.* 14), *s.* 80—*Housing Act,* 1935 (*c.* 40), *s.* 74—*Housing Act,* 1936 (*c.* 51), *s.* 103.

By the Housing Act, 1925, s. 80, the metropolitan borough councils are the local authority for the purposes of the Act so far as regards the provision of houses within the borough ; but the London County Council have power to submit a scheme for the approval of the Minister of Health for the development of land within the borough to meet the needs of outside districts. By the Housing Act, 1935, s. 74, the London County Council are made the local authority for the purposes of Part III of the Act of 1925 (i.e., provision of houses for the working classes) for any part of the administrative county of London outside the city of London for the purpose of providing housing accommodation in the cases therein mentioned. It was contended that, despite the words "Notwithstanding anything contained in the Housing Act, 1925, s. 80," in the above sect. 74, the Minister could not approve a compulsory purchase order made by the London County Council in respect of land within a metropolitan borough except under a scheme submitted to him under the Housing Act, 1925, s. 80 (2) (ii) :—

Held : (i) such an order can be made by the London County Council under the Housing Act, 1935, s. 74, without the submission of any scheme under the Housing Act, 1925, s. 80, and this is so whether the persons to be housed on the property acquired are or are not within the metropolitan borough in which such property is situated.

(ii) the court will interfere only where the Minister has misconstrued, or acted contrary to, the statutory provisions, and will not interfere with any finding of fact.

[**EDITORIAL NOTE.** The Housing Act, 1925, s. 80, and the Housing Act, 1935, s. 74, are now the Housing Act, 1936, s. 103. By these provisions the London County Council are given an overriding power in the cases mentioned in sect. 74 (now the 1936 Act, sect. 103 (4) (*b*), (*c*)) to provide housing accommodation for the working classes. It follows from the decision herein that the London County Council can accommodate persons displaced by slum clearance in one area of the county in an area which is situated within the jurisdiction of a different metropolitan borough council.

As to Provision of Housing Accommodation in London, see HALSBURY, Hailsham Edn., Vol. 26, pp. 561, 562, para. 1184 ; and for Cases, see DIGEST, Supp., Public Health, Nos. 502g-530a.]

Cases referred to :

(1) *Re Bowman, South Shields* (*Thames Street*) *Clearance Order, 1931,* [1932] 2 K.B. 621 ; Digest Supp. ; 101 L.J.K.B. 798 ; 147 L.T. 150.

(2) *Re Falmouth* (*Well Lane, Sedgmond's Court and Smithick Hill*) *Clearance Order, 1936, Application of Halse,* [1937] 3 All E.R. 308 ; Digest Supp. ; 157 L.T. 140.

Application to quash in whole or in part the County of London (Stoke Newington) Housing Order, 1936, upon the ground that the London County Council thereby exercised powers vested only in the metropolitan borough council.

The Housing Act, 1925, s. 80, as amended by the London County Council (General Powers) Act, 1926, s. 38 (now replaced by the Housing Act, 1936, s. 103) provides as follows:

(1) The local authority for the purposes of this part of this Act shall (*a*) as respects the city of London, be the common council; (*b*) as respects any other part of the administrative county of London, be the London County Council or A the metropolitan borough council as hereinafter provided; (*c*) elsewhere be the council of the borough or urban or rural district. (2) For determining whether in any case the London County Council or the metropolitan borough council is to be the local authority for the purposes of this part of this Act the following rules shall have effect: (*a*) the London County Council shall be the local authority for the county, to the exclusion of any other authority, so far as regards the provision of any houses outside the administrative county of London; (*b*) a metropolitan B borough council shall be the local authority for the metropolitan borough, to the exclusion of any other authority, so far as regards the provision of houses within the metropolitan borough: Provided that (i) nothing in this section shall prejudice or affect the rights, powers and privileges of the London County Council in regard to any lands, buildings, or works acquired, provided or carried out by the county council before July 31, 1919; and (ii) where the London County Council are satisfied that there is situate within the area of a metropolitan borough land [whether houses or other buildings are erected thereon or not] suitable for development for housing, C the county council may submit a scheme for the approval of the Minister for the development of such land to meet the needs of districts situate outside the area of such borough, [or with the consent of the council of that borough to meet the needs of that borough] and the county council may carry into effect any scheme which is so approved, and such approval shall have the like effect as if it had been given under sect. 60 of this Act; (*c*) the Minister may by order direct that any of the powers or duties of a metropolitan borough council under this part of this Act shall D be transferred to the London County Council, or that any of the powers or duties of the London County Council under this part of this Act shall be transferred to a metropolitan borough council. (3) The London County Council and the common council of the city of London [or the council of any metropolitan borough] may at any time enter into an agreement for carrying out any scheme for the purpose of this Part of this Act, and for the apportionment of the expenses incurred in carrying out such scheme.

E The Housing Act, 1935, s. 74 (now replaced by the Housing Act, 1936, s. 103 (4)), provided as follows:

(1) Notwithstanding anything contained in the Housing Act, 1925, s. 80, the London County Council shall be a local authority for the purposes of Part III of that Act as respects any part of the administrative county of London, other than the city of London, for the purpose of providing housing accommodation for persons of the working classes being either (*a*) accommodation rendered necessary by dis- F placements occasioned by action taken by the county council or by a metropolitan borough council under the Act of 1930 for dealing with a clearance area or for the demolition of insanitary houses; or (*b*) accommodation required for the purpose of the abatement of overcrowding; or (*c*) accommodation rendered necessary by displacements occasioned by action taken by the county council or by a metropolitan borough council under Part I of this Act.

(2) Notwithstanding anything contained in the Housing Act, 1925, s. 80, the G London County Council shall be a local authority as respects any part of the administrative county of London, other than the city of London, for the following purposes, that is to say, for the purposes of (*a*) sect. 57 (1) (*b*), (*c*) and (*d*) of the 1925 Act, (*b*) sect. 57 (2) of the 1925 Act, so far as that subsection relates to houses converted or acquired by a local authority; (*c*) sect. 58 (1) (*b*) and (*c*) of the Act of 1925.

Sydney G. Turner, K.C., A. H. Forbes and *W. H. Gattie* for the H appellants.

The Solicitor-General (*Sir Terence O'Connor, K.C.*) and *Valentine Holmes* for the respondent.

du Parcq, J.: This is an application to quash, either wholly or in part, the County of London (Stoke Newington) Housing Order, 1936, which was confirmed by the Minister of Health on Apr. 12, 1937. It was submitted on behalf of the applicants that the order was wholly bad, in that it authorised the London County Council to purchase compulsorily land in the metropolitan borough of Stoke Newington, and so arrogated to the London County Council a power which it could not obtain lawfully except after the submission and approval of a scheme under the Housing Act, 1925, s. 80 (2) (ii). On behalf of the Minister, it was contended that the Housing Act, 1935, s. 74 (1), gave power to the London County Council to make the order in question, subject to the confirmation of the Minister, without the submission of such a scheme.

The decision on this point depends ultimately upon the true construction of the Housing Act, 1935, s. 74. Part III of the Act of 1925, to which that section refers, dealt with the " provision of houses for the working classes," and gave extensive powers to local authorities. A local authority was given power by sect. 58 (1) (*a*):

> to acquire any land, including any houses or other buildings thereon, as a site for the erection of dwelling-houses for the working classes.

Power was given by sect. 57 (1) to:

> provide housing accommodation for the working classes (*a*) by the erection of dwelling-houses on any land acquired or appropriated by them.

The power of compulsory purchase was conferred upon local authorities by sect. 64 of the Act of 1925. The importance of sect. 74 of the Act of 1935 is that it makes the London County Council "a local authority for the purposes of Part III " of the Act of 1925. Each subsection of sect. 74 begins with the words, " Notwithstanding anything contained in sect. 80 of the Act of 1925." It seems to me to be plain that, in construing the succeeding words, sect. 80 of the 1925 Act is to be left out of account in so far as it contains anything which, if effect had to be given to it, would limit to any degree the new powers conferred on the London County Council by sect. 74.

Further, I am of opinion that it is impossible to limit the scope of sect. 74 (1) by any reference to sect. 74 (2). The two subsections can, and, in my opinion, ought, to be read separately, even though the powers which they confer may overlap. Sect. 74 (2) made the London County Council a local authority for certain purposes. A reference back to the Act of 1925 shows that these purposes include the acquisition of houses and other buildings for the accommodation of the working classes, but do not include the purchase of land with a view to the erection of houses on it by the authority itself. Thus, sect. 74 (2) gives to the London County Council no power to buy land in a borough in order to build houses thereon, even though there may be pressing need for the accommodation which such houses would provide. But, within the limits set by sect. 74 (2), the London County Council is free to act as a local authority, even though the need for the houses which it is acquiring, or for the other steps which it may be taking, cannot be assigned to any specific cause such as the specific causes enumerated in sect. 74 (1) (*a*), (*b*) and (*c*).

Sect. 74 (1), on the other hand, as I read it, permits the London County Council to acquire land, and itself to erect houses on the land acquired, and indeed to carry out all the purposes of Part III of the 1925 Act, subject to the limitation that these wide powers may be exercised only where the housing accommodation which it provides is "rendered necessary" (or "required") for the specific purposes mentioned in the subsection under (*a*), (*b*) and (*c*).

It follows, in my opinion, that, unless it can be shown that the order in question is not within the powers of the Act as limited by the terms of (*a*), (*b*) and (*c*), the attack upon it as a whole must fail.

It now becomes necessary to examine two further contentions on the part of the applicants. First, it is contended that sect. 74 (1) ought not to be construed as giving power to the London County Council to provide accommodation in a borough for the abatement of overcrowding outside that borough or for housing persons displaced by clearance orders affecting areas outside that borough. I cannot so read the section. In my opinion, the Act empowers the London County Council (within the prescribed limits) to provide accommodation in any part of the administrative county of London (other than the city), without regard to the question of whether the parts of the county from which the persons to be accommodated will be brought are or are not within the same borough as is that in which the accommodation is provided. I find nothing in the Acts to show a contrary intention. It is to be observed that, when the legislature intended to confine the powers of the London County Council within the limits of a borough, that intention was expressly and clearly stated: see the Housing Act, 1930, s. 16 (9). Secondly, it was argued that the purpose of the order appeared to be the provision of accommodation for which there was no present need, and that the London County Council derived from sect. 74 (1) no power to make provision for possible future needs. The applicants have failed to satisfy me that there is any substance in this contention. I assume, for the purposes of this case, and indeed I have little doubt (though it is not necessary that I should now decide), that, if the applicants satisfied me on proper materials that the Minister had put a wrong interpretation on the Act, and thus had been led to decide erroneously that the order was within the powers of the Act, the court would not be precluded from quashing the order merely because the Minister declared himself to be satisfied that in fact the terms of the Act had been complied with. Further, I am of opinion that the reference under (*a*) and (*b*) to accommodation "rendered necessary" and "required" does not extend to include accommodation which may possibly be rendered necessary or required in the future, but only to accommodation of which it can be said, at the time when the order is made, under (*a*) that action already has been taken which makes it necessary to provide accommodation in advance of displacements which will become necessary as the demolition of buildings in one or more clearance areas proceeds (see the Housing Act, 1930, in particular sect. 1 thereof), and under (*b*) that accommodation for the purpose of the abatement of overcrowding is then required.

I had before me the evidence on affidavit of Mr. Wrigley, director
and principal assistant secretary of the housing and town planning A
division of the Ministry of Health, who stated that he was authorised by the Minister of Health to make his affidavit. It appears from his evidence that the Minister, before confirming the order, considered a report as to the evidence given at the inquiry which had been held in
pursuance of the Acts and as to an inspection which had been made of B
the properties included in the order. The affidavit proceeds as follows :

> As a result of such consideration it was decided that the properties, the subject-matter of this appeal, were required by the London County Council for the purpose of providing housing accommodation for persons of the working classes being (*a*) accommodation required for the purpose of the abatement of overcrowding,
> and/or (*b*) accommodation rendered necessary by displacements occasioned by C
> action taken by the county council under the Housing Act, 1930, for dealing with clearance areas, and that the order ought to be confirmed.

Mr. Wrigley's evidence would have been clearer and more precise if he had avoided the use of the compound conjunction "and/or" in this
paragraph of his affidavit. If his words are translated into more correct D
and less commercial English, I take them to mean, upon a strict interpretation, that the Minister decided that the accommodation either was required for the abatement of overcrowding, or was rendered necessary by displacements, or, again, might be both required for the one and
rendered necessary by the other, but that he was not prepared to commit E
himself more definitely. It seems to me obvious that, if, as I am assuming, the court is not only entitled, but also bound, to ascertain whether the Minister has formed a correct opinion as to the powers conferred by the Act, a judge might find himself embarrassed by so non-
committal a statement. In this case, however, there is no suggestion, F
nor have I any suspicion, that the words were chosen with any desire to avoid a definite decision by taking refuge in ambiguity, and perhaps it would be pedantic to insist too much upon the literally exact meaning of Mr. Wrigley's words, which I think that I am entitled to read in the
light of the other evidence before me. I have been referred by counsel G
on each side to what they consider to be the material passages in the evidence at the inquiry. In my view, there was abundant evidence that the accommodation was required, at the date of the order, for the purpose of the abatement of overcrowding in other parts of London.
It is not so clear that the accommodation has been rendered necessary H
by displacements occasioned by action taken by the county council under the Act of 1930. I gather from the evidence that the paramount purpose for which the accommodation is required is the abatement of overcrowding, and that it is not intended to use it, except to a comparatively small extent, for the housing of the displaced inhabitants of

clearance areas. I have in mind particularly an answer given at the inquiry by the valuer to the London County Council. In so far as the Minister has decided that some part of the accommodation is rendered necessary by displacements, I need say only that, assuming my construction of the material words in the section to be correct, the applicants A have not satisfied me that he has taken a wrong view as to the powers conferred by the Act, nor that those powers have been exceeded.

I have now disposed of the case, with the exception of that part of the application which asks that the order may be quashed in so far as it affects certain lands which are the property of the applicants as trustees. B The ground of this part of the application is that the lands in question were, it is said, within the protection of the proviso to the Housing Act, 1925, s. 64, which exempts from compulsory acquisition any land :

> which at the date of the order forms part of any park, garden, or pleasure ground, or is otherwise required for the amenity or convenience of any house.

C It is not suggested that the Minister has misconstrued these words, and it cannot be said that there was no material before the London County Council, or before the Minister, on which it could be held, as a fact, that the lands were not within the terms of the proviso. In other words, the court is being asked to do what SWIFT, J., held that the court had D no right to do—namely, to interfere with a finding of fact : see *Re Bowman, South Shields (Thames Street) Clearance Order, 1931* (1), at pp. 634, 635, and *Re Falmouth (Well Lane, Sedgmond's Court and Smithick Hill) Clearance Order, 1936, Application of Halse* (2). I hold, following these decisions, that this part of the application also fails.

E It is perhaps desirable that I should add that, although I have had to deal with this application under the Housing Acts, 1925 to 1935, which, with certain irrelevant exceptions, have now been repealed and in substance re-enacted by the Housing Act, 1936, I see no reason to think that I should have had any difficulty in arriving at the same F result if it had been necessary, for the decision of the case, to construe the consolidating Act of 1936. The application is dismissed.

Application dismissed with costs.

Solicitors : *S. H. White* (for the appellants) ; *Solicitor to the Minister of Health* (for the respondent).

G

[*Reported by* JOCELYN BODILLY, ESQ., *Barrister-at-Law.*]

NORTH LEVEL COMMISSIONERS *v.* RIVER WELLAND CATCHMENT BOARD.

[Chancery Division (Luxmoore, J.), **February 2, 3, May 24, 26, 27, October 13, 15, December 13, 1937.]**

Land Drainage—Bank—Some distance from main river—Protection against flood—Whether bank within Land Drainage Act, 1930—*Liability to repair—Land Drainage Act,* 1930 (*c.* 44), *ss.* 1-7, 9, 11, 81.

The River Welland from Peakirk to Brotherhouse Bar is bounded (*a*) by a natural bank, within which the water normally flows, (*b*) by the Cradge Bank, up to which the water flows at spring tides, and (*c*) beyond the latter bank at a distance varying from fifty yards to three-quarters of a mile by the Barrier Bank, which protects the land beyond it at times of abnormal flooding. Before the passing of the Land Drainage Act, 1930, the liability to repair the Barrier Bank was admitted to be a liability of the plaintiffs, who contended that by the provisions of that Act such liability had been transferred to the defendants. By that Act the defendants became the catchment board for an area, part of the boundary of which runs along the top of the Barrier Bank:—

Held: (i) the Land Drainage Act, 1930, imposed no liability upon the catchment board except with regard to the main river, including the banks thereof and the drainage works in connection therewith.

(ii) the Barrier Bank was not a bank of the main river within the definition of "banks" given in the Land Drainage Act, 1930.

(iii) the plaintiffs were an internal drainage board within the provisions of the Land Drainage Act, 1930, and, as there had been no transfer of the liability to repair the Barrier Bank, they were still liable to do such repair.

[EDITORIAL NOTE. The main controversy here concerns the definition of the word "bank" in the Land Drainage Act, 1930. It is now clear that this only applies to the actual bank of the main channel of the river, and not to works remote from the river designed to minimise flood damage. The liability to repair such works remains upon the authority liable therefor before the passing of that Act.

As to Liability to Repair Drainage Works, see HALSBURY, 1st Edn., Vol. 25, Sewers and Drains, pp. 783, 784, para. 1345; and for Cases, see DIGEST, Vol. 41, pp. 53-55, Nos. 385-399.]

Case referred to:

(1) *Blackpool Corpn.* v. *Starr Estate Co.*, [1922] 1 A.C. 27; 42 Digest 770, *1974*; 91 L.J.K.B. 202; 126 L.T. 258.

Action for a declaration that the River Welland Catchment Board are liable for the maintenance and repair of part of a certain bank known as the Barrier Bank, which is not the bank of the main channel of the river, but a work situate at some distance from the main channel for the purpose of the prevention of floods.

H. J. Wallington, K.C., and *S. L. Elborne* for the plaintiffs.

A. M. Trustram Eve, K.C., and *G. D. Squibb* for the defendants.

Luxmoore, J.: The North Level Commissioners seek in this action to establish that the River Welland Catchment Board are liable for the maintenance and repair of part of an artificial bank situate on the south-east and east sides of, and at some little distance from, the present channel of the River Welland. The bank is known as the Barrier Bank.

and it extends from the village of Peakirk in the county of Northampton to the town of Spalding in the county of Lincoln. The part of the bank which forms the subject of this action extends from Peakirk to a place called Brotherhouse Bar in the county of Lincoln. The defendants deny liability to repair. The action was first in the list for hearing in Feb., 1937. Mr. Wallington, after he had opened the case on behalf of the North Level Commissioners, asked to be allowed to depart from the usual practice of proving the material facts strictly, and to put into the witness-box a gentleman who had for many years been, and still is, the clerk to the plaintiffs, to state to the court the result of his researches into the history of the Barrier Bank and the information acquired by him from the perusal of a number of Acts of Parliament, local histories and documents. I felt that it would be contrary to settled practice to accede to this request, but, in order to save expense, and with the assent of the defendants, I allowed the clerk to make his statement, and to be cross-examined by Mr. Eve, on behalf of the defendants, on the understanding that, after the whole of his evidence had been given, the hearing should be adjourned, to enable the parties to agree a statement of facts on which all questions at issue should be determined. This course was adopted, and ultimately a statement of facts was agreed. The action was restored to the list, and was before the court at the end of May, when there was further argument on the agreed facts. It transpired, however, that further evidence from the Minister of Agriculture was necessary, and there was a further adjournment. The case was ultimately restored to the list, and the hearing was concluded in the early part of the present sittings. The agreed statement of facts contains material which is of antiquarian interest, but a considerable portion of it does not seem to me to be material to the determination of the questions in issue.

The material facts appear to me to be the following: The River Welland is tidal at all points material to be considered in this action. Coming down the river from Peakirk to Brotherhouse Bar, in a north-east and north direction, is an artificial bank, known as the Deeping High Bank. On the other side of the river there is, at a short distance from the natural bank of the river (which was referred to as the fisherman's bank), another artificial bank, called the Cradge or Counter Bank, while beyond the Cradge Bank, and at a distance which varies from about 50 yds. at its nearest point to approximately three-quarters of a mile at its farthest point, there is a third artificial bank. This is the Barrier Bank, to which I have already referred. There is a very considerable acreage of land lying between the Deeping High Bank and the Barrier Bank. This land is known as the Crowland and Cowbit Washes. The dry-weather flow of the Welland is within the channel running between the Deeping High Bank and the fishermen's bank on the other side of the river, but at spring tides the water flows between the Deeping High Bank and the Cradge Bank, and the whole of the intervening land is then submerged. The top of the Cradge Bank is about 15.75 ft. above ordnance datum, while during the highest spring tides the river rises to approximately 14.25 ft. above ordnance datum, and is therefore about 1.5 ft. below the top of the Cradge Bank. In times of abnormal or prolonged rainfall the river overflows the Cradge Bank, and the flood water spreads substantially over the whole of the land between the Deeping High Bank and the Barrier Bank. The last-named bank prevents the flood water from extending over the land which lies beyond it. Between the Cradge Bank and the Barrier Bank there is also an artificial channel known as the New River, which is controlled by a sluice-gate at its junction with the River Welland, so as to prevent any of the tidal water running into it. The New River operates as the main drainage channel of the Crowland and Cowbit Washes.

The Barrier Bank was erected about 1650 to defend the land lying on the side of the Barrier Bank remote from the River Welland from the flood waters coming from the river and the Crowland and Cowbit Washes. The portion of the Barrier Bank between Peakirk and Brotherhouse Bar was erected by a number of gentlemen who were known as the Adventurers. They derived their powers from an Act of Parliament, passed on May 29, 1649, by the Commonwealth Parliament, which divided the Bedford Level into three parts : the North Level, the Middle Level and the South Level. The portion of the Barrier Bank to the north of Brotherhouse Bar between that place and Spalding was erected by the Adventurers of Deeping Fen about the same time as the part of the Barrier Bank between Peakirk and Brotherhouse Bar was erected.

By an Act passed in 1753 the North Level was divided into five districts. The first of these included and had as its northern boundary that part of the Barrier Bank which runs from Peakirk to Crowland. The fifth district included and had as its northern boundary that part of the Barrier Bank which runs from Crowland to Brotherhouse Bar. The last-mentioned Act established the North Level Commissioners as the body charged with the duty of controlling the drainage of the North Level, but the Act did not alter or affect the powers, duties and obligations with regard to the Barrier Bank, and these remained in the Bedford Level Corporation until the passing of the North Level Act, 1857, s. 38, which stated that all the powers, duties, authorities and jurisdictions of the Bedford Level Corporation, including the maintenance of the Barrier Bank between Peakirk and Crowland, should be vested in, and be used and exercised by, the North Level Commissioners.

On Oct. 5, 1928, an order, the short title of which is the Postland Drainage Order, 1928, was confirmed by the Minister of Agriculture under the Land Drainage Act of 1861 which constituted the Postland Drainage District. This order (by sect. 5) empowered the North Level Commissioners to acquire by agreement what is referred to in the order as the south bank of the River Welland from West Dam (i.e., Crowland) to

Brotherhouse Bar, together with the foreshore and osier beds, containing 93 acres and 3 roods of land, and two cottages at Brotherhouse Bar. The property referred to as the south bank of the Welland is admittedly that part of the Barrier Bank which runs between Crowland and Brotherhouse Bar. The section provided that, when and so soon as that part of the Barrier Bank had been acquired, the liability for its maintenance should be transferred from the owners and occupiers then responsible for its maintenance under and by virtue of the provisions of sect. 72 of an Act of Parliament passed in the year 1830 entitled "An Act for improving the drainage of the lands lying in the North Level part of the Great Level of the fens called Bedford Level and in Great Portsand in the manor of Crowland and for providing a navigation between Clow's Cross and the Nene Outfall Cut." It was further enacted by the Postland Drainage Order, 1928, that the maintenance of the part of the Barrier Bank between Crowland and Brotherhouse Bar should thereafter form part of the general works of the North Level Commissioners authorised to be done by the several Acts of Parliament relative to the North Level, and that the provisions of the said Acts of Parliament should apply in all respects to that part of the said bank as if it had been originally one of the banks authorised to be constructed and maintained by the North Level Commissioners.

On June 28, 1929, the portion of the Barrier Bank between Crowland and Brotherhouse Bar referred to in the Postland Drainage Order, 1928, s. 5, with the foreshore, osier beds, and cottages there mentioned, were conveyed to the plaintiffs by the then owner, subject, among other things, "to the entire liability for the maintenance of" the portion of the Barrier Bank thereby conveyed.

It is admitted that, at the date of the passing of the Land Drainage Act, 1930, the liability to maintain and repair the Barrier Bank between Peakirk and Brotherhouse Bar was, in the circumstances already stated, vested in the North Level Commissioners, the necessary powers to do so being derived from the North Level Drainage Act, 1857, and the Postland Drainage Order, 1928. The Land Drainage Act, 1930, s. 1, constituted drainage districts consisting of catchment areas. One of these catchment areas is the area the drainage of which is directed to the River Welland: see the Land Drainage Act, 1930, ss. 1 (4), (5), 2 (1), Sched. I, Pt. 1. By sect. 1 (3) of the Act it is provided that a drainage board:

> shall exercise a general supervision over all matters relating to the drainage of land within its district and shall have such other powers and perform such other duties as are conferred or imposed on drainage boards by this Act.

Sect. 3 provides for the constitution of the drainage boards of the various catchment areas and the appointment of members thereof. These drainage boards are called catchment boards. Sect. 4 provides that every catchment board shall, as soon as may be after it has been constituted, prepare and submit to the Minister of Agriculture for confirmation a scheme making provision for the transfer to the catchment board of :

> all such rights, powers, duties, obligations and liabilities (including liabilities incurred in connection with works) over or in connection with the main river as were immediately before the commencement of this Act vested in or to be discharged by any drainage authority, and of any property held by the authority for the purpose of, or in connection with, any functions so transferred ; and (ii) for any matters supplemental to or consequential on [such transfer]. A

The section contains provisions relating to the procedure to be adopted with regard to the confirmation of a scheme by the Minister.

Sect. 5 imposes on the Minister the duty of preparing in relation to each catchment area a map determining the extent of the area, and B showing by a distinctive colour that part of the channel of the river which is to be treated as the main river. The section also provides for the approval of the map by the Minister with or without variations. Sect. 5 (4) provides that the map of any catchment area, when approved, shall be conclusive evidence for all purposes as to the extent of the catch- C ment area, and as to what is the main river.

Sect. 6 provides that the powers conferred on drainage boards shall, so far as concerns the main river, including the banks thereof, and drainage works in connection with the main river, be exercisable solely by the catchment board. Sect. 6 (3) provides that, if the main river, D or any part of it, is at the commencement of the Act vested in any other drainage authority, it shall by virtue of this Act vest in the catchment board.

Sect. 7 provides that a catchment board shall exercise a general supervision with respect to the drainage of the catchment area, and may, E for the purpose of securing the efficient working and maintenance of existing drainage works within the catchment area, and for the construction of such new drainage works as may be necessary, give such general and special directions as they consider reasonable for the guidance of the internal drainage boards with respect to the exercise and per- F formance by these boards of their powers and duties as such. The rest of the section imposes a fetter on the powers of the internal drainage boards by making the consent of the catchment board essential in the cases specified in the section, and empowers the catchment board in certain specified areas to execute the necessary work at the expense of G the internal drainage board. Sect. 10 confers on the catchment board a general power to exercise the powers of any internal drainage board in case of default by that board.

By sect. 34, every drainage board acting within its district is given power to maintain, repair, and improve existing watercourses or drainage H works, and to construct new works, but it is expressly provided that a catchment board shall not, by virtue of the powers conferred by this section, be taken to be authorised to do any work otherwise than in relation to the main river.

Pausing here, it is to be observed that the Act itself imposes no obli-

gation or liabilities on the catchment board, except with regard to the main river, including the banks thereof, and drainage works in connection with the main river. Apart from the main river and its banks, the duty imposed on the catchment board is in the main to supervise the work of the internal drainage boards, and, in case of the failure of any of the
A last-named boards to fulfil its obligation, to carry out the necessary work at the expense of the internal drainage board in default.

Even with regard to the main river, the Act imposes no liabilities or obligations. If any liability or obligation is to be imposed in this respect, it can be imposed only by a scheme made by the catchment board under
B sect. 4 and confirmed in due course by the Minister of Agriculture.

The Act contains an interpretation section (sect. 81) in which the expressions, " main river," " banks," " internal drainage district " and " internal drainage board " are respectively defined in these terms :

C " Main river " includes any structure or appliance for controlling or regulating the flow of water in or out of the channel, and situate therein or in any part of the banks thereof other than any such structure or appliance which is vested in or controlled by an internal drainage board :

" Banks " means banks, walls, or embankments adjoining or confining, or constructed for the purposes of or in connection with, any channel or sea front, and includes all land between the bank and low-water mark :

D " Internal drainage district " means a drainage district within a catchment area or, in the case of a drainage district situate partly within and partly without a catchment area, so much thereof as is situate within the catchment area, and " internal drainage board " means the drainage board of an internal drainage district.

In Mar., 1931, the Minister, in pursuance of the provisions of the Land
E Drainage Act, 1930, s. 5, approved a map of the Welland Catchment Area. In that map the area is shown as surrounded by a blue verge line, while the main river is coloured red. As originally approved, the main river comprised not only the present channel of the river Welland but also the New River. The Minister of Agriculture subsequently,
F in Mar., 1932, varied the map under the powers conferred on him by sect. 5 (3) by confining the main river to the present channel of the Welland and by taking out of the description of the main river the stream known as the New River.

It is difficult to determine the precise position of the blue verge line
G shown on the map at the point in relation to the Barrier Bank, but this difficulty has been set at rest by reference to the Minister of Agriculture, for, on July 2, 1937, in answer to an inquiry by the solicitors to the North Level Commissioners, an officer of the Ministry of Agriculture wrote stating that the dividing line between the Welland and Nene
H Catchment Areas was the centre of the top of the bank which lies between these two catchment areas. This statement has been accepted by the plaintiffs and by the defendants, and, for the purposes of this section, it is agreed that the half of the Barrier Bank between Peakirk and Brotherhouse Bar nearer to the present channel of the Welland is included in the catchment area of the River Welland, while the other

half of the Barrier Bank between the points mentioned is outside that catchment area.

In pursuance of the powers and provisions of the Land Drainage Act, 1930, the defendants were constituted the River Welland Catchment Board at the beginning of 1932. Shortly afterwards, the board submitted to the Minister for confirmation a scheme in accordance with the provisions of sect. 4 (1) (*a*) of the Act. The scheme was in due course confirmed by the Minister.

It is under this scheme that the plaintiffs contend that the defendant board is under liability to maintain and repair the portion of the Barrier Bank in question; but it was admitted that, having regard to the contents of the map to which I have already referred, that liability cannot extend beyond that half of the portion of the Barrier Bank which is included in the catchment area of the defendant board.

The scheme is stated to be submitted under the Land Drainage Act, 1930, s. 4 (1) (*a*), and to be for the transfer to the River Welland Catchment Board:

> of all the rights powers duties obligations and liabilities incurred in connection with all work in progress for the extension of the outfall of the River Welland seawards more particularly referred to hereafter over and in connection with the "main river" as defined on the map of the River Welland Catchment Area sealed by the Minister of Agriculture on Mar. 9, 1931, and varied on Mar. 3, 1932, as were immediately before the commencement of the Act vested in the Welland Drainage Board and the River Welland Outfall Trustees respectively and discharged by them and of the property held by the said two authorities for the purposes of and in connection with the functions so transferred.

Then follow transfers of specific properties which do not include any part of the Barrier Bank. These transfers are followed in cl. 9 by a transfer in these words:

> and generally all rights powers duties obligations and liabilities over or in connection with the main river as were immediately before the commencement of the said Act vested in or to be discharged by any drainage authority and any property held by any such authority for the purposes of or in connection with such rights powers duties obligations and liabilities so far as the same have not been hereby specifically transferred.

This is the section which is relied on by the plaintiffs as transferring from them to the defendants the liability to maintain and repair the portion of the Barrier Bank in question. It is to be observed that there is no express mention of the Barrier Bank or any part of it in this section, nor indeed does such mention occur elsewhere in the scheme, and it seems plain that this section cannot transfer any such liability unless it can be shown that, on the true construction of the Land Drainage Act, 1930, the term "main river" necessarily includes the Barrier Bank. Mr. Wallington argued that the Barrier Bank was in fact included because in a number of Acts of Parliament and documents the Barrier Bank was admittedly referred to as the south bank of the River Welland. References to the material passages in these Acts and documents are set out in the agreed statements of facts; but it is to be noted that there are set out in that paragraph many other references to the Barrier Bank which are couched in different language. For instance, the Barrier Bank is sometimes referred to as " a bank defending the North Level from the River Welland," and in one case, where the Barrier Bank is referred to as the south bank of the River Welland, there are statements which show that it was constructed to defend the North Level from and against land floods.

A But, even assuming that the Barrier Bank was universally known and referred to as the south bank of the River Welland at the time when the Land Drainage Act, 1930, was passed, this fact would not be decisive of the case, for the Land Drainage Act, 1930, contains definitions of the terms " main river " and " banks," and, unless the Barrier Bank is B included in such definitions, it would be impossible to hold that the liability to maintain and repair any part of the Barrier Bank had been transferred from the North Level Commissioners to the River Welland Catchment Board. The transfer can have been made by the scheme only, for the Act does not itself transfer any such liability to the catchment C board, although it confers on the catchment board the sole and exclusive right to exercise the powers conferred by the Act on drainage boards so far as the main river including the banks are concerned: see the Land Drainage Act, 1930, s. 6, to which I have already referred.

The scheme is not concerned with the transfer of powers conferred D by the Land Drainage Act, 1930, and can deal only with the transfer of powers, liabilities and obligations which were, immediately before the passing of the Act, vested in a drainage authority. There is no mention in cl. 9 of the scheme of the banks of the main river, but only of the main river itself. The definition of the main river in sect. 81 contains no E direct reference to its banks, but there is an indirect reference to them in connection with " structures or appliances for controlling or regulating the flow of water in and out of the channel." These structures are described as being situate in the main river or in any part of the banks thereof. By the definition, " banks " means " banks, walls or embank-F ments adjoining or confining or constructed for the purposes of or in connection with any channel, and includes all land between the bank and low-water mark." It seems to me to be impossible, on this definition, to hold that the Barrier Bank, which is in some places as much as three-quarters of a mile distant from the channel of the River Welland, is a G bank " adjoining " that channel. It certainly does not in any ordinary sense of the word " confine " the waters of the Welland. This word is apt to describe the function of the natural or fisherman's bank. Nor can it be said to have been constructed for the purposes of and in connection with the channel of the River Welland in the same way as the H Cradge Bank was constructed. The purpose for which the Barrier Bank was constructed appears plainly to have been to protect the land lying on the side of the Barrier Bank remote from the River Welland from the flood waters of the district on the side of the Barrier Bank nearer to the river. The meaning of the definition becomes clearer when we consider its last words, " and includes all land between the bank and low water mark," for it would appear to be an abuse of language to define as a bank the flat tract of land comprising many hundred acres constituting the Crowland and Cowbit Washes and lying between the river and an artificial bank erected at a distance in some places of more than three-quarters of a mile from it.

The fact that the boundary of the Welland Catchment Area runs along the top of the Barrier Bank so that the half of that bank remote from the River Welland is excluded from the catchment area also affords cogent support to the view I have expressed that the Barrier Bank does not fall within the definition of bank in the Land Drainage Act, 1930. In any event, those responsible for the scheme cannot have contemplated the transfer of rights, liabilities and obligations in respect of any part of the Barrier Bank which lies outside the catchment area as conclusively defined by the map sealed by the Minister, for it would be *ultra vires* so to do.

It is further to be observed that the Land Drainage Act imposes no liabilities or obligations on the catchment board. If the board have become subject to liabilities or obligations, they can be discharged only under the particular Acts of Parliament which created them and which are still in force. It would be difficult to hold that the general words of the Land Drainage Act, 1930, or of any scheme under it, were sufficient to override the provisions of the respective Acts of Parliament which created the obligations and liabilities, and imposed them on the North Level Commissioners. In my judgment, the maxim *generalia specialibus non derogant*, as explained in *Blackpool Corporation* v. *Starr Estate Co.* (1), applies, and I am satisfied that the relevant provisions of the North Level Act, 1857, which imposed the obligations and liabilities to maintain and repair the portion of the Barrier Bank between Peakirk and Brotherhouse Bar on the North Level Commissioners and their predecessors in title, still remain in force. In my judgment, having regard to the provisions and definitions contained in the Land Drainage Act, 1930, the North Level Commissioners are, so far as concerns the portion of the Barrier Bank in question which is comprised in the River Welland Catchment Area—an internal drainage board of that area, and, as such, are liable for the maintenance and repair of it.

In the result, I hold that the River Welland Catchment Board are under no liability to maintain and repair the Barrier Bank between Peakirk and Brotherhouse Bar, or any part of it, and are therefore under no liability to pay any of the moneys claimed from that board by the North Level Commissioners. I further hold that the North Level Commissioners are not entitled to any of the declarations sought in the action. The action therefore fails, and must be dismissed with costs.

Solicitors: *Lee, Ockerby & Co.*, agents for *Whittome & Co.*, Wisbech (for the plaintiffs); *Smith, Rundell, Dods & Bockett*, agents for *Calthrop & Leopold Harvey*, Spalding (for the defendants).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

TRIPLEX SAFETY GLASS CO., LTD. *v.* SCORAH.

[Chancery Division (Farwell, J.), **November 5, 8, 1937.]**

Master and Servant—Invention of Servant—Right of master to benefit of—Implied condition—Express condition for assignment—Express agreement for invention to be exclusive property of master—Validity.

The plaintiff company employed chemists to prosecute research work, and suitable processes thus discovered were duly patented by the company. The defendant was an assistant chemist who, by his contract with the company, undertook to communicate to the company any processes discovered by him, and to assign to the company any patents granted to him. The contract further provided in general terms that all available information gained by the defendant should be communicated to the company, and that such information should be the exclusive property of the company. In 1932, the defendant discovered a method of producing acrylic acid, and this discovery was the subject of a patent application. The plaintiff company, however, did not proceed with the patent, and the matter dropped. Certain further discoveries were communicated to the company in 1934, before the defendant left the services of the company on Apr. 30 of that year. Towards the end of 1934, the defendant discovered the properties of acrylic acid as an adhesive, not for the purposes of safety glass, but for the purposes of laboratory glass, and in 1935 he was granted a patent to protect that discovery. That patent would prevent the plaintiff company from using acrylic acid as an adhesive in their manufacture of safety glass, as they later wanted to do. Upon the failure of negotiations for the purchase of the patent by the company, the company brought this action for a declaration that they were entitled to have the patent assigned to them :—

Held : (i) the company were not so entitled under the express terms of the contract, because a provision for the communication to the company of general knowledge, as distinct from secret processes, acquired in the course of the employment and the preventing of the use of such information after the employment had ceased were too wide in their effect, and, therefore, unenforceable as contrary to public policy.

(ii) in the circumstances, the defendant was a trustee of the invention for the plaintiff company, and was bound to assign the rights therein when requested to do so by the company, subject to his being indemnified against any costs to which he might be put. The refusal of the plaintiff company to use the invention in 1932, and their subsequent delay in applying for a patent, did not amount to a release or waiver of their rights in this respect.

[EDITORIAL NOTE. A secret process must not be disclosed by the servant either during the period of his employment or afterwards, but the law does not extend this protection further than is necessary to protect the actual processes of the manufacturer. An employee cannot, therefore, after the employment has ceased, be restrained from using the general knowledge which he acquired during his employment. An invention, however, made during his employment, which he is under a duty to impart to his employers, and the patent rights in which he is bound by contract to assign to them, is held by him in trust for his employers, and this is so although the employers do not desire to use the invention until some time after the employment has ceased. There may be circumstances which amount to a release of their rights by the employers ; but the mere fact that they do not think it necessary or desirable to use such a process until three or four years after the termination of the employment is not in itself evidence of such a release.

As to Duties of Servant to Master, see HALSBURY, Hailsham Edn., Vol. 22, pp. 183-185, paras. 307-309; and FOR CASES, see DIGEST, Vol. 34, pp. 121, 122, Nos. 923-935.]

ACTION for a declaration that the plaintiff company were entitled to have assigned to them certain letters patent, granted to the defendant in respect of an invention alleged to have been made during the period of his employment with the company. The facts and arguments are fully set out in the judgment. A

Lionel Heald, K.C., and *Basil Drewe* for the plaintiff company.

R. A. Willes for the defendant.

FARWELL, J.: The plaintiff company, a limited company carrying on business as manufacturers of the well-known Triplex safety glass, now very largely used in motor vehicles, are continually on the lookout for methods of manufacture which may be more suitable than the methods known to them, and employ chemists to conduct research work into the various methods of making safety glass. Any discoveries which are made for the company by the chemists, if and when they prove to be of commercial value, are duly patented, and in that sense the company do not indulge in what are usually known as secret processes. That is to say, as soon as the discovery or invention has reached the point where it is of commercial utility, it is patented by the company, and therefore becomes known to the world, and the world can make use of the discovery, subject to the consent of the owners of the patent. But, until any discovery or invention has been patented, the company are extremely anxious that it should not be divulged, because there may be a considerable period between the time when the invention or discovery is made and the time when the invention attains a condition of commercial utility, and is therefore worth patenting. In that respect, and in that respect only, the plaintiff company have secret processes. That is to say, they have from time to time discoveries or inventions which they desire should not be divulged until they are in a position to be patented. B C D E

On May 1, 1929, the plaintiff company took into their employ the defendant, who is a chemist and, no doubt, a skilful person in his business. He was employed as an assistant chemist in the laboratories of the plaintiff company, and he worked for them for some three or four years. After he entered the employment of the plaintiff company, there was a written agreement between the parties, and it is necessary for me to refer to that agreement. It is dated Nov. 16, 1929. It was made between the plaintiff company and the defendant and it was mutually agreed that: F G

> The company shall employ the assistant chemist and he shall serve the company as assistant chemist at the company's factory at King's Norton or such other place as the company shall appoint. H

The employment was to begin as from May 1, 1929, and the defendant was to devote his whole time and attention to the service of the company. By the agreement it was provided:

> 4. The assistant chemist shall also at all times use his best efforts to keep himself

> continuously informed of and acquainted with all matters pertaining to safety glass of all makes and the manufacture thereof and at all times when required by the company he shall give to the company or their agent or agents all such available information as may be required and the assistant chemist shall attend at any place for purposes of experiments demonstration consultation or conferences as may be from time to time requested by the company.
>
> 5. The assistant chemist shall take all due precautions to keep secret and shall himself keep secret all records knowledge or information that shall come into his possession which may be of value in the manufacture of safety glass and shall take the like precautions to prevent such records knowledge or information from passing into the possession of any person or persons or company not expressly authorised in writing by the company to receive them.
>
> 6. The said records knowledge or information gleaned or discovered by the assistant chemist shall be the exclusive property of the company and any new application thereof that shall be conceived by or become known to the assistant chemist as applicable to Triplex or safety glass processes and methods shall be communicated fully forthwith by him to the company or as the company shall direct. The assistant chemist shall at the expense of the company take all such steps and do all such acts and things as the company may consider necessary and require to vest any patents when granted in the company and to enable the company to derive the full benefit of any or all of such information or inventions patents protections or improvements as shall be derivable therefrom.
>
> 7. In the event of any patents being taken out in the name of the assistant chemist with or without any other names the assistant chemist shall thereafter at the request and cost of the company transfer the same to the company or as the company shall direct.

There is a provision as to salary, and then para. 9 states:

> 9. In consideration of this agreement and the employment hereby created the assistant chemist agrees with the company not to enter the employment of nor to act as chemist to any individual firm or company manufacturing or contemplating the manufacture of safety glass within a period of one year from the date of his leaving the employ of the company and not at any time to make disclosure of his knowledge of Triplex processes to any individual firm or company.

That agreement was entered into and remained in existence until the employment was determined by the defendant leaving the service of the company on Apr. 30, 1934.

In 1932, the defendant was instructed by Mr. Wilson, the head chemist, on behalf of the company, to discover, if he could, a method of producing what is known as acrylic acid. He promptly set to work to do what he could in that regard during the course of his employment by the company, in the company's hours, and using the materials of the company. In the way described in the defence, in a sense by a lucky accident, he made the discovery that he was after, and he very properly and in pursuance of his obligation to the company communicated that fact to the company by informing Mr. Wilson, who reported the matter to the board. In a document of Mar. 15, 1932, there appears the report of Mr. Wilson to the board, in which he says:

> We have just worked out a method for the manufacture of methyl acrylate by the following two-stage process . . . I suggest that the company should cover the method of approach in case we fail to find a really cheap method of making the acrylic acid nitrite whose conversion to methyl acrylate has already been covered in our provisional application 28900/31. Meanwhile, we are concentrating on other methods of manufacture in the hope of working out a still better process.

The board did not accept that suggestion. They did nothing whatever to patent or protect in any way that discovery. They then proceeded with another method of making safety glass which did not require the use of this particular substance, and for the moment they took no further interest in it. In the early part of 1934, however, the matter came up again, and, according to the evidence of the defendant, he himself suggested that this acrylic acid might be polymerised and used as an adhesive in the manufacture of safety glass. Mr. Wilson, who was his immediate senior, proceeded to make certain investigations into the use of it in that way. The use of acrylic acid in that way undoubtedly came to the knowledge of Mr. Wilson, and was brought to his knowledge by the defendant some time in March, while the defendant was still in the employment of the company.

When the defendant ceased to be in the employment of the company, he set up business on his own account as a manufacturer of laboratory glass, not safety glass. Towards the end of 1934, he discovered that the use of acrylic acid as an adhesive, not for the purposes of manufacturing safety glass, but for his own purposes of manufacturing glass, was useful and of value, and, accordingly, on Jan. 15, 1935, he applied for a patent to protect that discovery, which he had undoubtedly made some two or three years before. The patent was duly granted in 1935. It is plain, when one looks at the first claim of the patent specification, that the claim is one for the manufacture of this particular substance, and that the second claim is for the use of it as an adhesive. I think that there cannot be any doubt that, so long as that patent remains in the name of the defendant, it would undoubtedly prevent the plaintiff company from making use of the substance as an adhesive, as they now desire to do. After the application had been made, and before the plaintiff company ascertained that the application had been made, they themselves attempted to patent this discovery, but they found that there was this prior grant to the defendant in their way. They thereupon got into communication with the defendant, and requested the defendant to assign his patent to them. The defendant was not anxious to do that. He was offered by the company what seem to me to be very fair terms—namely, that, if he would assign the patent to them, they would pay (as, of course, they must and would have to, in the circumstances) the expenses of the defendant in patenting the invention, and would give to him a free licence to use the discovery for all purposes of his own, except for the purpose of making safety glass. The defendant, however, did not see his way to accept that offer, and, accordingly, this action was begun.

I have seen the defendant in the witness-box and have no doubt that he is a person of skill and knowledge in his own profession, but obviously he is not a person of skill and knowledge in the law. I have no doubt at all that he is a perfectly honest person who did not intend to do anything which he was not entitled to do, but did what he did under the honest belief that he was entitled to do it. I have, however, to consider from the legal point of view whether he had any such right as he claims to patent this invention in his own name. The first way

in which the plaintiff company put their case is that by the express terms of the contract of service the defendant was bound to do what they asked him to do—namely, to assign to them the benefit of the patent as being a discovery made by him while he was in their employment. With regard to that, Mr. Willes has addressed to me an extremely
A interesting argument, his contention being that this contract of service is too wide to be enforceable.

The principles which are applicable in cases of this kind are now quite plainly settled by the decisions of the House of Lords, and they may be stated quite shortly in this way. *Prima facie*, every contract which
B is in restraint of trade made between an employer and an employee is illegal as against public policy, and is not enforceable in these courts, and the onus is on an employer to show that the terms of the contract are not more than are reasonably necessary for the proper protection of himself and his business and are not injurious to the public as a whole.
C Unless the employer can show both of those things, then the contract, so far as it is a contract in restraint of trade, is not enforceable. It must also be remembered that no employee is entitled to filch his employer's property in whatever form that property may be, whether it is in the form of a secret process or whether it is in some other form. That is,
D and remains, the property of the employer, and must not be wrongfully used by the employee in any way. On the other hand, no employer is entitled to prevent his employee from making use, in the service of any persons or in his own business, of any knowledge or skill which the employee has gained by his term of service with the employer. It
E would obviously be very injurious to the public as a whole that a man who had learned his business, or a large part of his business, in the workshops or laboratories of an employer should not be entitled to make use of that in any other way, and, therefore, any information or skill or knowledge which he has acquired in the business of the employer,
F apart altogether from secret processes or any such like property, is something which the employee is entitled to use in any way he pleases after the employment has ceased. When one bears those principles in mind and looks at this contract, it is extremely difficult to see how the contract could be properly construed so as to bring it within the limits
G which the law allows. In para. 4 of the agreement, an obligation is placed on the employee to keep himself informed of and acquainted with all matters pertaining to safety glass of all makes and the manufacture thereof, and at all times when required to give the company such available information; so that his business was, among other
H things, to find out—of course, not by illegal methods, but, in so far as he could legally do so, by reading technical papers or trade papers, or attending lectures, or in any other way—any information available with regard to the manufacture of safety glass, and that information he had to communicate to the employer. But to suggest that, because he had to communicate to the company information which he had acquired in

any way, he was to be thereby debarred from making any use of the knowledge which he so acquired seems to me to be doing that which the law does not permit. If these covenants are so wide that they do seek to impose on the employee, first of all, an obligation to acquaint himself as far as possible with all the various methods of making safety glass and then to prevent his making use of information so acquired by him after he has ceased to be in the employment of the company, that, in my judgment, is exactly what the law will not permit, because it is seeking to prevent his using the information which he has acquired while, it is true, in the employment of the company—not being information which he has obtained from the company's secret processes or anything of that sort, but only a general knowledge which he has acquired. When, too, I read para. 6 of the contract, it seems to me again that the company is seeking to do that which the law will not allow, because the contract provides that:

> the said records knowledge or information gleaned or discovered by the assistant chemist shall be the exclusive property of the company.

That seems to me to be far too wide, and not to be a term of a contract which this court could possibly enforce. If that be so, it seems to me to be quite impossible to say that this contract is one which the court will recognise, and, therefore, so far as the action is an action founded on the express contract, it cannot succeed.

That leaves me, however, to deal with the question how far there may be an obligation upon the defendant to do that which the plaintiffs asked him to do, apart from the express contract altogether. The first ground on which the defendant seeks to avoid that conclusion is by saying that, where one has an express contract containing terms which are not enforceable for any reason, the court will not imply terms, because the court will assume that all the terms are in the written document and that therefore there is no room for any implication as to other terms. It is said that, this provision in the contract not being enforceable, there cannot be implied from the employment of the defendant by the plaintiff company any term whereby the defendant is under any obligation to do that which he is asked to do here. No doubt to some extent the suggestion that an express contract excludes any implication is true, but I do not think it can be taken to the lengths to which Mr. Willes has invited me to go. It obviously cannot be, where a servant covenants in his contract of service to behave properly and honestly towards his employer, and the contract of service is too wide to be enforceable, that the servant is thereby entitled to be as dishonest and to act as unfairly as he pleases towards his employer. That is reducing that suggestion to an absurdity. On the other hand, an obligation not to compete will not be implied where there is a covenant not to compete which is too wide to be enforceable. In a case of this sort, however, in my judgment, it is a term of all employment, apart altogether from any express covenants, that any invention or discovery made in the course of the employment of the employee in doing that which he is engaged and instructed to do during working hours, and using the materials of his employer, is the property of the employer, and not that of the employee, and that, having made such a discovery or invention, the employee becomes a trustee for the employer of that invention or discovery, as the case may be, and he is, therefore, as a trustee, bound to give the benefit of any such discovery or invention to his employer, at any rate during the employment.

Then it is said: "If that be so, this employee was permitted, having communicated this discovery to his employers, to leave the employment of the company, when the company had made no attempt to patent or to protect the discovery in any way. He was allowed to remain out of the employment of the company on his own account for some two years, and, when he did seek to patent the discovery for his own purposes, it would be inequitable for the company to be allowed to intervene and tell him that they wanted the benefit of the discovery and ask him to assign his patent to them." I think, however, that that argument overlooks the point that, once a person is put into the position of a trustee, he cannot avoid the obligations attached thereto unless the beneficiaries release him, either expressly or impliedly. It might be that, in certain cases, the court might be able to imply a release from special circumstances, but, in my judgment, the mere fact that nothing was done in the matter for some period is wholly insufficient evidence on which to suggest that there was any such release in this case. In those circumstances, in my judgment, the defendant became a trustee of this discovery or invention by reason of the fact that he made it while in the employment of the company and during the company's working hours, in pursuance of the orders of the company's servants. He has not ceased, and cannot have ceased, to be a trustee, and, if that be so, the result must follow that, when the beneficiary calls on him to assign to the beneficiary the property of which he is a trustee, he is bound to do so, subject only to the fact that the trustee is entitled to be indemnified against the costs to which he has been put in connection with the property of the beneficiary. The trustee is not bound to spend money on the property of another, and he is entitled to be protected against any expenses which he has incurred in protecting that property, but, subject to that, the beneficiary is entitled to call on the trustee to transfer the property to him. In this case, it seems to me that, on that ground, the plaintiff company are right in this action, and are entitled to call on the defendant to assign to them the letters patent in question.

Declaration accordingly and order for assignment of the letters patent.

Solicitors: *Bird & Bird* (for the plaintiff company); *Sharpe, Pritchard & Co.*, agents for *Pepper, Tangye & Winterton*, Birmingham (for the defendant).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

CORBETT *v.* INLAND REVENUE COMMISSIONERS.

[Court of Appeal (Sir Wilfrid Greene, M.R., Romer and MacKinnon, L.JJ.), **December 9, 10, 13, 1937.]**

Income Tax—Sur-tax—Residuary life tenant—Sums credited to residuary life tenant during period of administration.

The appellant was assessed to sur-tax for the year ending Apr. 5, 1935, in a sum which included a sum of £17,073, being the gross equivalent of a sum of £13,600 13*s.* 9*d.*, placed to the credit of the appellant's wife by the executors of her late father's will, under which she was entitled to three-fifths of the residue of his estate for life. The appellant's wife's father died on Apr. 24, 1934, and the residue was not, and could not have been, ascertained till May 7, 1935. There was nothing to show whether the sums were the result of a realisation of capital or income assets, but the income arising from the estate during the period of administration was insufficient to pay the expenses of administration :—

Held : the sums credited to the appellant's wife did not attract sur-tax, and the assessment on the appellant ought to be reduced accordingly.

Decision of Lawrence, J. ([1937] 3 All E.R. 808 *affirmed*).

[EDITORIAL NOTE. The Court of Appeal have dismissed this appeal from Lawrence, J., holding, as he did, that the case is governed by the previous decisions in *Barnardo's Homes* v. *Income Tax Special Comrs.* (2), and *Marie Celeste Samaritan Society of London Hospital* v. *Inland Revenue Comrs.* (3). Romer, L.J., however, has said that if he had not felt himself bound by authority, he might have arrived at the opposite conclusion.

As to Residuary Legatees and Income Tax, see HALSBURY, Hailsham Edn., Vol. 17, pp. 256, 257, paras. 521, 522 ; and for Cases, see DIGEST, Supp., Income Tax, Nos. 483*a*, 673*c*, 673*d*.]

Cases referred to :

(1) *Allhusen* v. *Whittell* (1867), L.R. 4 Eq. 295 ; 23 Digest 464, *5358* ; 36 L.J. Ch. 929 ; 16 L.T. 695.

(2) *Barnardo's Homes* v. *Income Tax Special Comrs.*, [1921] 2 A.C. 1 ; 23 Digest 394, *4653* ; 90 L.J.K.B. 545 ; 125 L.T. 250 ; 7 Tax Cas. 646.

(3) *Marie Celeste Samaritan Society of London Hospital* v. *Inland Revenue Comrs.* (1926), 43 T.L.R. 23 ; Digest Supp. ; 11 Tax Cas. 226

(4) *Wahl* v. *Inland Revenue Comrs.* (1933), 149 L.T. 203 ; Digest Supp. ; 17 Tax Cas. 744.

(5) *Sudeley (Lord)* v. *A.-G.*, [1897] A.C. 11 ; 23 Digest 463, *5354* ; 66 L.J.Q.B. 21 ; 75 L.T. 398 ; *affg.* S.C., [1896] 1 Q.B. 354.

(6) *Re McEuen, McEuen* v. *Phelps*, [1913] 2 Ch. 704 ; 23 Digest 464, *5359* ; 83 L.J. Ch. 66 ; *sub nom. Re McEwen, McEwen* v. *Phelps*, 109 L.T. 701.

(7) *Re Wills, Wills* v. *Hamilton*, [1915] 1 Ch. 769 ; 23 Digest 465, *5363* ; 84 L.J.Ch. 580 ; 113 L.T. 138.

Appeal by the Inland Revenue Commissioners from an order of Lawrence, J., dated July 29, 1937, and reported in [1937] 3 All E.R. 808. The facts are fully stated in the judgment of Sir Wilfrid Greene, M.R.

The Solicitor-General (*Sir Terence O'Connor, K.C.*), *J. H. Stamp* and *Reginald Hills* for the appellants, the Commissioners of Inland Revenue.

A. M. Latter, K.C., *R. H. Hodge* and *F. Heyworth Talbot* for the respondent, Rev. L. Corbett.

Sir Wilfrid Greene, M.R.: Sir Richard Garton died on Apr. 22, 1934, having made a will dated Mar. 1, 1933, whereby, after the bequest of certain pecuniary and specific legacies, he devised and bequeathed all his real and personal property, except property otherwise disposed of, to his executors and trustees upon trust to convert the same into money and out of the proceeds to pay his funeral and testamentary expenses and debts in the usual way. Under cl. 11 of the will, the trustees were to invest the residue, which was in the will called the trust fund. By cl. 12, they were to stand possessed of the trust fund upon trust to divide it into five equal shares, of which three were to be held upon trust for his daughter Dorothy, upon trust to pay the income to her for life, and after her death in trust for her children.

The testator was a very wealthy man. His daughter Dorothy, who was entitled to three-fifths of the residue for life, was Mrs. Corbett, the wife of the present respondent. The residuary account of the testator's estate was made up as at May 7, 1935, and that is the date as on which it is to be taken that the residue was finally ascertained. In the accounts prepared by the executors, there appeared items showing a credit to Mrs. Corbett and to Mrs. Barlow, who, under the will, was entitled, I think, to the other two-fifths shares. In the case of Mrs. Corbett, the credit was £13,600. That account in which that entry appears was an account made out by the executors, not for the purpose of death duties, but for the purpose of showing the position of the estate as regards the beneficiaries. The credits were arrived at by applying the well-known rule in *Allhusen* v. *Whittell* (1), with regard to which I shall have more to say later.

The present respondent was assessed to sur-tax for the year ending Apr. 5, 1935, in a sum of £31,239, which included £17,073. This latter sum was the £13,600 to which I have referred, which had been placed to his wife's credit by the executors, with an addition for income tax. In other words, the amount placed to her credit was grossed up for the purpose of ascertaining the proper sum to bring into the computation for sur-tax purposes. The appellant appealed against that assessment, and contended that the sum of £13,600 ought not to have been brought into the assessment at all. That contention was rejected by the special commissioners, but, when the matter came before Lawrence, J., on appeal from their decision, he allowed the appeal, holding that the case was governed by *Barnardo's Homes* v. *Income Tax Special Comrs.* (2).

Before the special commissioners and before Lawrence, J., the contention of the Crown was that the whole of the £13,600 ought to be brought into assessment and grossed up. Before this court the Crown does not say that, but it limits its claim to a sum of £6,000 which was actually paid to Mrs. Corbett at some time before Apr. 5, 1935. That payment appears, in the account to which I have referred, under the heading "Payments on account, £6,000."

As I have said, no distinction was drawn in the argument before the special commissioners, nor in that before Lawrence, J., between that £6,000 and the remainder of the £13,600 which had been only credited to Mrs. Corbett, and not paid over to her. The Solicitor-General, in opening the case, attached some special importance to the fact of payment of that £6,000. He described it as an assent by the executors to the gift to Mrs. Corbett, and on that basis he claimed that it was, so to speak, by anticipation bringing into effect the trusts of the will relating to the income of the residuary estate. With regard to the balance, if and when it came to be paid, he did not say that that balance would necessarily be brought into account for sur-tax purposes, because he thought, or appeared to think, that that might possibly fall into a different category. I am unable to attach to the fact of payment the particular importance which the Solicitor-General invited us to attach to it, because, if the argument was that this was in some sense an assent by executors, that would be a matter upon which the special commissioners ought to have found the facts. No such point was taken before them, no such fact was found, and I cannot regard that payment, as described in the accounts in the way I have mentioned, as anything other than a payment on account of the amount to which Mrs. Corbett would be found to be entitled when the ultimate adjustment came to be made upon the close of the administration and the ascertainment of the residue. It seems to me that that is all it is, and that it has no special quality beyond that.

Mr. Stamp, on behalf of the Crown, put the argument in a different way. He did not appear to attach to the fact of payment that special importance which the Solicitor-General attached to it. The way he put the case was that every payment to Mrs. Corbett, whether it was made pending the administration or at the conclusion of the administration, when the *Allhusen* v. *Whittell* (1) adjustment was finally made, was of necessity an income payment, and, as such, formed part of Mrs. Corbett's income, and was part of her income, and, in consequence, of her husband's income, for sur-tax purposes. He accepted the position—and I think that he was bound to accept it—that no difference could be drawn between a payment on account pending administration and the final payment, when it comes to be made, of the amount due to Mrs. Corbett on the *Allhusen* v. *Whittell* principle (1). In other words, the only reason why the £7,600 which had not been paid does not come into her sur-tax assessment or her husband's sur-tax assessment for the year in question is the fact that it had not then been paid, and that, when it came to be paid, it would be in exactly the same position as would be the £6,000, although in a different year.

Lawrence, J., held, as I have said, that the case was covered by the *Barnardo* case (2), and that no distinction was to be drawn between the case where the residue is settled and the case where the residue is given absolutely, so far as regards the application of the principles laid down in that case.

It is said on behalf of the Crown that, while accepting the principle

of the *Barnardo* case (2), it does not in any case apply to a case where there is a tenancy for life of the residue, for the reason that what the tenant for life receives must be income, and can be nothing else. The question, to my mind, depends on the true meaning and effect of the *Barnardo* decision (2). That decision, in point of fact, has been applied
A by ROWLATT, J., in the case of *Marie Celeste Samaritan Society of London Hospital* v. *Inland Revenue Comrs.* (3), in a way inconsistent with the Crown's present contention, and it follows that, if the Crown is right upon this appeal, the decision in the *Marie Celeste* case (3) was wrong, a circumstance which may no doubt give comfort to the Inland Revenue,
B having regard to the fact that in that case it obtained a decision after putting forward an argument precisely the reverse of the argument which it has put forward in this case.

The *Barnardo* case (2) was a case in which a charity was endeavouring to obtain repayment of tax under the sections in the Income Tax Act
C giving charities exemption. It is perfectly correct to point out that in that case the charity was claiming return of tax deducted from specific dividends received by the executors. What had happened was that the charity was absolutely entitled to the residuary estate under the will. There was delay, owing to litigation in which the next-of-kin contested
D the will, and, at the conclusion of the administration, the executors handed over a sum to the charity. The charity claimed that, with reference to such part of that sum as could be referred to income, tax had been suffered in respect of it when it was paid to the executors, and they claimed to recover. The particular language relating to the
E exemption of charities which was then in force was to be found in the Income Tax Act, 1842, s. 88, Sched. C, para. 3, which provided that there should be exemption from tax in respect of :

> The stock or dividends of any corporation, fraternity, or society of persons or of any trust established for charitable purposes only, or which, according to
> F the rules or regulations established by Act of Parliament, charter, decree, deed of trust, or will, shall be applicable by the said corporation, fraternity, or society, or by any trustee, to charitable purposes only, and in so far as the same shall be applied to charitable purposes only. . .

In sect. 105 there was a further exemption extending to yearly interest or annual payment chargeable under Sched. D, in so far as such interest
G or payment was applied to charitable purposes only.

The contention of the charity was negatived by the House of Lords. The one and only contest in this case, to my mind, is : What was the real basis of the decision in that case ? I cannot read the opinions in that case as having such a limited application as the Crown in this
H appeal would have us hold. It appears to me that the case lays down a general proposition applicable to all cases of residue which is being ascertained and which cannot be ascertained until the administration is complete. We have an authoritative statement as to the effect of that case in the opinion of VISCOUNT BUCKMASTER in *Wahl* v. *Inland Revenue Comrs.* (4). I propose to read the passage in question before I come to

examine the decision in *Barnardo's* case (2), because it puts in a nutshell what, in my opinion, if I may respectfully say so, is the effect of the *Barnardo* decision (2). VISCOUNT BUCKMASTER says, at p. 759:

> Since the case of *Barnardo's Homes* v. *Income Tax Special Comrs.* (2), it has been clearly established that the accumulation of income arising from a residuary estate before the appropriation of that estate to the residuary legatees does not cause such income to be regarded as the income of the beneficiary on its ultimate receipt by him and, therefore, where, as in that case, the beneficiary was a charitable institution, they are not entitled to a return of the sums which have been deducted by way of tax from the income at its source. In that decision, in the Court of Appeal, ATKIN, L.J., pointed out that the result would be that, in similar circumstances, super-tax could not be charged. A

It is quite obvious from that observation that, in the view of VISCOUNT B BUCKMASTER, at any rate, the principle underlying the *Barnardo* case (2) was not a limited principle turning entirely on the precise language of the provisions of the Income Tax Act relating to the exemption of charities. He read it, as I read it, as deciding the case of the charity concerned upon the larger principle that, until the residue is ascertained C in the due course of administration, the beneficiaries have no title to that residue. From that major proposition there followed the minor proposition that the charity could therefore have no right to these dividends in respect of which it was claiming repayment of tax.

That that was the view of the House of Lords, or that that must be D taken to be the view of the House of Lords, in the *Barnardo* case (2), appears, I think, quite apart from what VISCOUNT BUCKMASTER said, from a consideration of a passage in the opinion of VISCOUNT FINLAY and of a passage in the opinion of LORD ATKINSON. I will deal in a moment with what was said by the fourth member of the House, VISCOUNT E CAVE. There were four noble and learned Lords sitting.

VISCOUNT FINLAY says, at p. 8:

> It appears to me that the present case is really decided by the decision of this House in *Sudeley* (*Lord*) v. *A.-G.* (5). It was pointed out in that case that the legatee of a share in a residue has no interest in any of the property of the testator F until the residue has been ascertained. His right is to have the estate properly administered and applied for his benefit when the administration is complete. The income from which this income tax was deducted was not the income of the charity. It was the income of the executors. They were, of course, bound to apply it in a due course of administration, but they were not trustees of any part of it for the charity. There had been no creation of a trust in favour of the charity in respect of this income, it was never paid over to the charity as income. What was ultimately paid over on the close of the administration was the share of the whole estate, G consisting of capital and accumulated income, which fell to the charity. The executors, not the charity, were the recipients of this income, and there is no relation back in the case of the bequest of a residue. If no right of deduction at the source had existed it is the executors, and the executors only, who could have been made liable for the tax.

Pausing there for a moment, the language of VISCOUNT FINLAY is, H in my opinion, just as applicable to the case where the residue is settled as it is to the case where the residue is not settled. In neither case are the executors trustees; in neither case is the income the income of anybody but the executors; in each case the executors and not the beneficiaries are the recipients of the income, and there is no relation back; in each case, if no right of deduction at the source had existed, it is the executors, and the executors only, who could have been made liable for the tax. I myself attach great importance to the distinction drawn between the position and estate of executors and the position and estate of trustees, for the reason that, where trustees are in receipt of income which it is their duty to pay over to beneficiaries, either with or without deduction of something for trustees' expenses on the way, that income is, at its very inception, the beneficiaries' income. It is perfectly true that for assessment purposes the trustees may fall to be assessed, but the income is the beneficiaries' income from the very first, and the expenses so paid out of it are paid out of it, so to speak, on the way. But, in the case of executors, it is not true to say (and this is how I read the opinion of VISCOUNT FINLAY) that the income, when received by executors pending the conclusion of the administration, is the income of the beneficiaries in that sense.

LORD ATKINSON said, at p. 11:

> The case of *Sudeley* (*Lord*) v. *A.-G.* (5) decided in this House conclusively established that until the claims against the testator's estate for debts, legacies, testamentary expenses, etc., have been satisfied, the residue does not come into actual existence. It is a non-existent thing until that event has occurred. The probability that there will be a residue is not enough. It must be actually ascertained. And if this be so, then it cannot be held that until the residue has been ascertained any residuary legatee is entitled thereto within the meaning of the Income Tax Act, 1842, s. 88, Sched. C, or that the payment of income tax on any portion of the income of the testator is a payment made on behalf of the residuary legatee. Rule 3 of Sched. C does not apply, because what is applicable to the charity is the residue when ascertained. The principle applied by a court of equity to a case between a tenant for life and a remainderman of a residue, to prevent the entire income of that fund being, during the life of the tenant for life, taken towards discharging the claims on the testator's estate has no application to the present case.

That, of course, is a reference to the rule in *Allhusen* v. *Whittell* (1), to which VISCOUNT CAVE refers more fully in his opinion.

VISCOUNT CAVE does, it is true, attach more importance to the precise language of the exemption clauses, because he says, at p. 9:

> On reading the above provisions it is clear that exemption is given only in respect of any dividends, interest or other annual payments "of"—that is to say, belonging to— a charity, or which according to its trust instruments are applicable to charitable purposes only, and only in so far as they are in fact applied to charitable purposes. The appellants must, therefore, in order to succeed in their claim, prove that the dividends from which tax was deducted were dividends (*a*) belonging to the appellants, or (*b*) applicable to their charitable purposes only, and (*c*) in fact so applied. Plainly this cannot be said of these dividends when received. When the personal estate of a testator has been fully administered by his executors and the net residue ascertained, the residuary legatee is entitled to have the residue as so ascertained, with any accrued income, transferred and paid to him; but until that time he has no property in any specific investment forming part of the estate or in the income from any such investment, and both corpus and income are the property of the executors and are applicable by them as a mixed fund for the purposes of administration.

That concluding paragraph is, it seems to me, of general application, and this is equally true whether you are dealing with a residue given absolutely or a residue settled to a tenant for life with a remainder over.

VISCOUNT CAVE then goes on to deal with *Allhusen* v. *Whittell* (1), and, after stating what the effect of that case is, he says, with regard to the argument which had been based upon it on behalf of the charity, at p. 10:

> In my opinion this argument is misconceived. The rule in *Allhusen* v. *Whittell* (1) is confined to cases where a residuary fund is held in trust for several persons in succession, and where for the purposes of ascertaining the rights of the beneficiaries *inter se*, it is necessary to disentangle the accounts and to determine what part of the total fund should be treated as income and paid to the life tenant. In this case there is no trust and no life tenant; and there is no authority whatever for applying the rule in question to a case where the residuary legatee is absolutely entitled to the residue. A

I cannot read that reference to *Allhusen* v. *Whittell* (1) as by implication saying that, where the residue is settled, the *Allhusen* v. *Whittell* (1) B principle should be applied for the purpose of stamping with the character of "income-tax income" the sum paid under that rule to the tenant for life. It must not be forgotten that, although, as between tenant for life and remainderman, in applying equitable principles, a certain sum is to be treated as income and another sum is to be treated C as capital, it does not necessarily follow from that proposition that the sum which equity says is to be treated as income for that purpose, and as between those parties, is income as between the recipient and the revenue. The *Allhusen* v. *Whittell* (1) rule really exists to save the tenant for life from being prejudiced by the particular nature of the D executor's interest and by the particular status of the estate during administration. When the residue is not settled, but is given absolutely, the residuary legatee receives, on the conclusion of the administration, a sum of money. There is no necessity in that case for equity to insist upon any splitting up, any dissection, of that sum of money, because E the entirety belongs to the residuary legatee. Nevertheless, that sum of money, if its origin is to be traced, represents in part income and in part capital. There can be no question of that. On the other hand, when the residue is settled, it does become necessary to dissect the sum which remains in the executor's hands at the conclusion of the administration, F because, if that were not done, the tenant for life would be prejudiced by the fact of administration, and the longer it took the more he would be prejudiced. Equity then steps in and says: "As between the tenant for life and the remainderman, we are going to impress, for our own purposes, a particular character on this fund. We are going G to treat it, as between you two parties, as divisible in part to the tenant for life and in part to the remainderman." The principle on which it is divided is thus a principle which in effect throws upon the tenant for life the burden of the administration, to this extent, that capital is treated as liable to contribute such a sum of capital as, with the income H thereon for the relative period, will provide for the necessary expenses. The effect of that adjustment is that the tenant for life, when he receives that sum, is receiving a sum equal to the income of the estate, less the income which that part of capital applied would have produced. These calculations do not represent anything that has happened in truth and in fact, but are purely notional calculations for the purpose of applying the rule of equity. It is perfectly true, as I have said, that the sum which the tenant for life receives on that apportionment as between him and the remainderman he receives as income, but that is quite a different proposition from saying that the sum which he receives is A his income for the purposes of the Income Tax Acts. The language of VISCOUNT CAVE is, as usual, very carefully chosen, because, in stating the rule, he says, at p. 10 :

> . . . it is necessary to disentangle the accounts and to determine what part of the total fund should be treated as income and paid to the life tenant.

B Just above, he says, at p. 10 :

> . . . the tenant for life is entitled as from the death of the testator to a sum equal to the income of the residue of the estate after deducting such portion of the capital as, together with the income of such portion for one year, was required to pay the testator's debts and legacies.

Then he points out again that there is no trust and no life tenant.

C In my opinion, the existence of the rule in *Allhusen* v. *Whittell* (1) cannot alter the fundamental fact that, during the period of administration, the income is the executor's income and nobody else's. As LORD ATKINSON said, and as had been pointed out by LORD STERNDALE, M.R., and by ATKIN, L.J. (as he then was), in the Court of Appeal, the residue D does not exist until the estate is cleared. The tenant for life, accordingly, was not entitled to any income from that non-existent thing. Mr. Stamp referred to a number of examples, and a number of cases was referred to both by the Solicitor-General and by Mr. Stamp. I do not propose to go into those, because they do not appear to me really to assist the E argument. Cases and examples dealing with the rights of beneficiaries under trusts seem to me to stand in a different category altogether from that in which a residuary legatee stands *vis-à-vis* executors. The fundamental difference of the two cases was recognised by the House of Lords in the *Barnardo* case (2), and I do not myself find any assistance from F considering cases of trusts. Mr. Stamp submitted that what the tenant for life here received was in exactly the same position as would be a sum of income paid to a beneficiary under a trust out of a fund which had borne tax before it reached the hands of the trustees. I am unable to accept that argument. It seems to me that in such a case the income, G when it came into the hands of the trustees, was the income of the beneficiary, and the tax which it bore was the beneficiary's tax. It is true that the trustees' hand was the hand to receive it. It is true that the trustees, after receiving it, might have to pay expenses out of it, with the result that the tenant for life received only a net sum. Never- H theless, the right and interest of the beneficiary in the dividends so received by the trustees under a trust of that kind appear to me to differ in every fundamental respect from the right and interest of a residuary legatee in dividends received by executors during the period of ad ministration. That is the difference on which the *Barnardo* case (2) is really based.

The matter can be looked at from rather a different angle, but I think with the same result. A taxpayer is liable to pay sur-tax in respect of his income, and, when he makes his return of total income for the purpose of sur-tax, he brings in the whole of his income. Where the income is income which has borne tax at the source, he brings in the gross amount. That is on the basis that the income, when received, and when struck with tax by deduction, was his income, and that is so notwithstanding the circumstance that the hand of trustees might be interposed between his hand and that of the payer. But in the present case it is quite impossible to say that, because the income, when received by the executors, was not the beneficiary's income. It was the executors' income. That was pointed out as clearly as anything could be pointed out in the *Barnardo* case (2). It is, of course, impossible for the Crown to suggest that the £6,000 that was paid here was an income different from that received by the executors. They do not claim that the recipient of that £6,000 was directly assessable in respect of it, nor do they suggest that, on paying that £6,000, the executors ought to have deducted tax. In other words, they do not treat that £6,000 as being a new income springing up when it was paid, but they link it with the income received by the executors, upon the allegation that the income, when received by the executors, was the income of the beneficiary for tax purposes. It seems to me that there is an unbridgeable gap which makes it impossible to link that £6,000 to the dividends received by the executors, because it is impossible to trace the title of the beneficiary to that £6,000 back into the income which the executors received, because that income was the executors' income, and nobody else's.

The only other matter to which I wish to refer is the *Marie Celeste* case (3), because, if that case was rightly decided, it is the same as the present case. In my opinion, the *Marie Celeste* case (3) was rightly decided, and for correct reasons. It was a case where there was a gift to a charity upon trust. I think it is clearer if I refer to the terms of the will. In the will, after making certain bequests, the testator devised and bequeathed the residue of his estate to his trustees upon trust to sell and convert the same into money, and out of the produce to pay legacies and debts, to set apart a sum to answer an annuity to his wife, and to stand possessed of the residue upon trust for the governors of the London Hospital, Whitechapel Road, to be held by them upon trust for investment, and to stand possessed of the investments upon trust to pay the income for the purposes of the Marie Celeste Samaritan Society. Then the trustees were given various powers. The estate was administered, and during the period of administration the executors received large amounts of income, and had a substantial surplus on income account. Pending the completion of the administration, they handed over to the charity certain specific sums. In respect of those sums (not in respect of any specific dividends, but in respect of those sums so paid over) the charity claimed to recover the appropriate tax. It was contended on behalf of the Crown in that case at p. 230 :

> (1) That the residue of the estate was not ascertained earlier than Aug. 31, 1919 ; (2) that until the residue of the estate had been ascertained the income was the income of the executors and not that of the appellants or the governors.

A That is precisely the argument which the Crown in this case contests.

ROWLATT, J., said, at p. 231 :

> In my opinion, this appeal fails upon a point which may be a narrow one but which I think is sufficient. That point is that the income of the assets of this estate—being, I will assume, assets producing income within the category named in sect. 37 (1) (*b*) of the Income Tax Act [which now takes the place of one of the provisions B considered in the *Barnardo* case (2)] that income, at the time it was received, at the time when tax was deducted, and in the form (meaning the form named in that category) in which it was received, was the income only of the executors, and that the money paid to the charity—the £4,000 or £5,000 odd paid to the charity—said to be income, was, if income, not such income as is described in that category, but was (to use the precise language of VISCOUNT CAVE in the *Barnardo's Homes* case (2)) " a sum equal to the income " which was payable to the charity as a matter of " equitable bookkeeping " (to use the expression used in the argument C in the Court of Appeal) in due course of administration. Such system of equitable bookkeeping arises when there are successive interests in a residue, as in the case of *Allhusen* v. *Whittell* (1). That is enough to dispose of this case.

In my opinion, as I have said, I think that that decision was correct, and that decision cannot be treated as having been given on any narrow D point such as Mr. Stamp suggested was the ground of the decision of the *Barnardo* case (2), based upon the necessity of pointing to some specific dividend of some specific security. In my opinion, the appeal fails, and must be dismissed with costs.

E ROMER, L.J. : If I did not regard myself as precluded from doing so by authority, I should myself have decided this case in favour of the appellants, for I should have thought that, when the rule in *Allhusen* v. *Whittell* (1) is applied as between tenant for life and remainderman of a residuary estate, and when a sum is, in accordance with that rule, ascer-F tained as being the sum properly payable to the tenant for life, the sum so paid to him would be his income, and would be income which had already been brought into tax. After all, the rule in *Allhusen* v. *Whittell* (1), as subsequently explained by SARGANT, L.J., in *Re McEuen, McEuen* v. *Phelps* (6) and *Re Wills, Wills* v. *Hamilton* (7), is no more than this, G that, for the purpose of adjusting rights as between the tenant for life and the remainderman of a residuary estate, debts, legacies, estate duties, probate duties and so forth are to be deemed to have been paid out of such capital of the testator's estate as will be sufficient for that purpose, when to that capital is added interest on that capital from the date H of the testator's death to the date of the payment of the legacy or debt, or whatever it may have been, interest being calculated at the average rate of interest earned by the testator's estate during the relevant period. When once the capital of the residuary estate has been ascertained in the way that I have mentioned, that capital is capital of the residuary estate, without any question. It is the capital to which the persons interested in the capital of the residuary estate are entitled. In the same way, I should have thought that, when, from the total income received by the executors, there has been deducted the amount of income, ascertained in the way I have mentioned, required for the purposes of paying the debts and so forth, the balance of what has been received by the executors represents part of the residuary estate to which the tenant for life is then and there entitled. In the same way with the residuary estate when it is finally determined. Speaking for myself, again in the absence of authority, I should have thought that the same rule would apply whenever and wherever it became necessary for any purpose whatsoever to ascertain what, when the residue was finally ascertained, represents income and what represents corpus. In other words, where the residue is given absolutely to a charity, I should have thought that the charity was entitled to have, in accordance with the rule of *Allhusen* v. *Whittell* (1), the amount ascertained that represents income of the residue handed over to the charity for the purpose of enabling the charity to claim a return from the Crown of the income tax that can be found to have been paid in respect of that sum. So, too, I should have thought, in the case of a bequest of residue to an individual, the Crown would be entitled to have it ascertained, in accordance with the rule of *Allhusen* v. *Whittell* (1), how much of what was handed over by the executors to the residuary legatee could properly be said to represent income. But I think I am prevented from holding these views, by reason of the decision of the House of Lords in the *Barnardo* case (2). The *Barnardo* case (2) was a somewhat unusual one. It was a case of a very simple administration in one respect. That is to say, the debts were all paid. Therefore, the estate would have been cleared within a very short time after probate had been granted. It is so stated, I think, by Viscount Finlay in the opinions in the House of Lords. The distribution of the estate, and therefore the ultimate ascertainment of the residue, was held up, not by difficulties of administration, but by the fact that the next-of-kin—the whole of the residue having been bequeathed in favour of the charity—disputed the will, so that the ultimate residue was not finally ascertained until the action was compromised, as it eventually was compromised, on terms which entitled the charity to receive two-thirds of the net residue and the next-of-kin to receive the other third. The two-thirds of the residue, as ultimately ascertained, having been handed over to the charity, the charity discovered that, in the meantime, certain sums for income tax had been deducted at source from the income received by the executors. Having regard to what I have said about the estate being really cleared at a comparatively early time, it seems more than probable that amongst the assets handed over to the charity, as representing the residue, were the identical securities that had borne the tax which the charity was seeking to recover, and, that being so, for the purpose of formulating their claim, the charity would no doubt claim the exact sum of income tax that had been deducted from those specific securities.

because that income tax so deducted would represent, in that event, the income tax deducted from the sum ascertained to be income by the application of the rule in *Allhusen* v. *Whittell* (1). Although that was, as I understand it, the actual claim of the charity—that is to say, to be repaid the income tax that had been paid in respect of certain specific A securities—the case was not argued on the footing that the charity were entitled at any time to the income of those specific securities before distribution. It appears to have been argued on the broad footing that the charity were entitled to receive as income what, applying the doctrine in *Allhusen* v. *Whittell* (1), should be found to be the sum, the part B of residue, attributable to that income. That plainly appears, I think, if one looks at the argument of Mr. Clauson (as he then was), on behalf of the appellants, the charity, in the House of Lords, in the *Barnardo* case (2). After referring to sect. 88 of Sched. C, as extended by sect. 105, those being the sections under which the charity claimed that they C were entitled to exemption from tax, he said, at p. 3 :

> If then the legislature has exempted the appellants' income the question to be determined is what is in substance and in fact the income to which the appellants are entitled. The Court of Appeal have proceeded on the basis that until the residue is ascertained it cannot be said that the residuary legatees are entitled to anything. . . . The appellants had a present right to the residue when ascertained. Subject D to adjustment, they were entitled to the residue from the death of the testator, and the income which that residue earned, although the exact amount could not be ascertained till later.

That is, if I may so call it, an *Allhusen* v. *Whittell* argument (1) throughout. The argument on behalf of the Crown pointed out, amongst other things, at p. 4 :

E

> It is not put by the appellants that these dividends were the property of the charity, but their case is put on some sort of equitable accounting applicable to an estate settled on tenant for life and remaindermen on the analogy of *Allhusen* v. *Whittell* (1).

So that the case was presented to the House of Lords as an *Allhusen* v. F *Whittell* case (1). VISCOUNT CAVE was the only member of the House who referred in terms to *Allhusen* v. *Whittell* (1), and he said that the *Allhusen* v. *Whittell* rule (1) did not apply in such a case. That is to say, it did not apply to a charity which was anxious to discover what part of the residue handed over to it represented income. The other two mem- G bers of the court who delivered opinions—namely, VISCOUNT FINLAY and LORD ATKINSON—must, however, be taken to have been deciding that, even if the rule in *Allhusen* v. *Whittell* (1) did apply to the charity, nevertheless the sum ascertained in accordance with that rule as being the sum that would have been paid over to a tenant for life in a case of tenant for H life and remainderman would not be income of a charity which had been taxed. That, I think, would account for the very general terms of the language which both VISCOUNT FINLAY and LORD ATKINSON used. VISCOUNT FINLAY said, at p. 8 :

> There had been no creation of a trust in favour of the charity in respect of this income, it was never paid over to the charity as income.

Of course, he is dealing there, no doubt, with the specific sums. Then he says :

> What was ultimately paid over on the close of the administration was the share of the whole estate, consisting of capital and accumulated income, which fell to the charity.

That is precisely true of a tenant for life and a remainderman. What is handed over is the fund, consisting of capital and accumulated income, accumulated income being handed over to the tenant for life, and the capital being kept in trust for the person entitled to the corpus of the residuary estate. Then Viscount Finlay, after referring to that income (the accumulated income) says, at p. 8 :

> The executors, not the charity, were the recipients of this income . . .

Lord Atkinson, in still plainer terms, says, at p. 11 :

> . . . that until the claims against the testator's estate for debts, legacies, testamentary expenses, etc., have been satisfied, the residue does not come into actual existence. It is a non-existent thing until that event has occurred.

If it is a non-existent thing until that event has occurred, it cannot possibly be earning income in the meantime. A non-existent thing cannot possibly earn income.

Language to much the same effect was used, I notice, in the Court of Appeal in the same case. Lord Sterndale, M.R., said, at p. 660 :

> The executors as soon as the residue was ascertained became trustees for the residuary legatees of that fund, but until that was ascertained there was no fund to which they could become, or did become, trustees for the residuary legatees at all.

Atkin, L.J. (as he then was), contrasting the case of a person entitled to a pecuniary legacy with that of a person entitled to the residuary estate, said, at p. 662 :

> It is not merely that the amount of the legacy is not ascertained [the residue] but that the legacy is not even in existence in the form in which it is bequeathed to the legatee. It appears to me that there is no authority for the proposition that the title of a residuary legatee relates back to the death as soon as the executor has ascertained the amount and has intimated to the legatee what that amount is.

Applying that as I have no doubt Atkin, L.J., intended it to be applied—namely, to the case of a tenant for life and a remainderman—when, by the application of the rule of *Allhusen* v. *Whittell* (1), you have discovered the sum that ought to be handed over by the executors to the tenant for life, it cannot be said by the tenant for life or against the tenant for life that his title to that sum relates back to the death of the testator, so that it can be said that that sum represents income accruing from the death of the testator until the time when it is handed over. For these reasons, notwithstanding the conclusion I should have come to but for the decision of the House of Lords in *Barnardo's* case (2), I feel that I am precluded by that decision from giving effect to those views. I agree accordingly that this appeal fails, and must be dismissed.

MacKinnon, L.J. : I agree. I think that the Commissioners of Inland Revenue in this case are hoist with the two petards of their own previous making, the *Barnardo* case (2) and the *Marie Celeste* case (3). The *Marie Celeste* case (3) is absolutely indistinguishable from this case. In that case, there was £5,000 at stake, and in this case there is £6,000. Except for irrelevant considerations of consistency—and possibly for considerations of decency—there is, of course, nothing to prevent the A appellants from arguing, as they did here, that the *Marie Celeste* case (3) was wrongly decided by Rowlatt, J., I think that it was not. I think that he decided the case rightly, in that he was only applying the principle that bound him, as it binds us, enunciated by the House of Lords in the *Barnardo* case (2).

B *Appeal dismissed with costs.*

Solicitors: *Solicitor of Inland Revenue* (for the appellants); *Tamplin, Joseph, Ponsonby, Ryde & Flux* (for the respondent).

[*Reported by* Reginald Townsend, Esq., *Barrister-at-Law.*]

C

MERCANTILE UNION GUARANTEE CORPORATION, LTD. *v.* WHEATLEY.

[King's Bench Division (Goddard, J.), **November 23, 1937.**]

D *Hire Purchase—Implied condition—Title of owners—Material date when title must be shown—Commencement of bailment—Date of delivery.*

A hire-purchase agreement between the parties to this action in respect of a motor lorry was dated Feb. 7, 1936. The plaintiffs thereby let the lorry to the defendant upon the terms usually inserted in hire-purchase agreements. The plaintiffs, a hire-purchase finance company, E had not at that date bought the lorry from the dealer. They did, in fact, buy and pay for it on Feb. 11, 1936, and it was delivered to the defendant on Mar. 8, 1936. The plaintiffs retook possession of the car upon the defendant falling into arrear with the payments under the agreement, and brought this action to recover the sums due under the agreement. The defendant contended that, as at the date of the agreement the plaintiffs were not the owners of the car, he was entitled to F repudiate the agreement:—

Held: it was sufficient that the plaintiffs were the owners of the car at the time of the bailment, that is, the delivery of the car to the intended purchaser, under the hire-purchase agreement.

Karflex, Ltd. v. *Poole* (1) *considered.*

[EDITORIAL NOTE. It was decided in *Karflex, Ltd.* v. *Poole* (1) that there was G an implied condition as to title in the case of a hire-purchase agreement. In that case the hirers had no title at any time that could be material to the case. In the present case, the agreement being with a finance company and not with the actual dealers, it was sought to repudiate the agreement upon the ground that the finance company had not become the owners at the time of the agreement, though they had at the time of the delivery of the lorry. It therefore became necessary to H consider the decision in *Karflex, Ltd.* v. *Poole* (1) and to decide at what point of time the implied condition as to title must be satisfied. It is decided that the material time is the commencement of the bailment, that is, the delivery of the lorry, and not the date of the agreement.

As to Implied Condition of Ownership, see HALSBURY, Hailsham Edn., Vol. 16, p. 515, para. 758; and for Cases, see DIGEST, Vol. 3, pp. 92-98, Nos. 241-268.]

Case referred to:

(1) *Karflex, Ltd.* v. *Poole,* [1933] 2 K.B. 251; Digest Supp.; 102 L.J.K.B. 475; 149 L.T. 140.

Action to recover £177 3*s.* 11*d.*, the arrears of instalments and depreciation money under a hire-purchase agreement. The facts are fully referred to in the judgment.

Gordon Alchin for the plaintiffs.

W. Russell Lawrence for the defendant.

Goddard, J.: This is a claim under a hire-purchase agreement in respect of a motor lorry, but, when the facts are looked into, it is really hire-purchase finance, and it is abundantly clear that the defence, with all respect, has no merits whatever. The defendant has got exactly what he bargained for; but it is sought to bring the case within the decision of *Karflex, Ltd.* v. *Poole* (1), in which, to my mind, the facts were wholly different. Some time at the end of 1935, Mr. Wheatley, the defendant, entered into negotiations with Dunns Motors, Ltd., of Taunton, for the purchase of a Commer lorry. Mr. Wheatley could not pay cash for it, and Dunns Motors, Ltd., therefore, on the terms which are usual with nearly every motor dealer, had an arrangement with a hire-purchase finance company, through which the defendant made proposals for the plaintiffs to finance the transaction. For some reason, which does not seem to matter very much, that transaction was never perfected. On Nov. 16, 1935, a suggestion was made for a hire-purchase agreement in respect of a 4/5-ton Commer lorry, 1935 model, at a price of £485. The parties, with somewhat unnecessary haste, then seem to have signed all the documents. Mr. Wheatley signed a proposal for hire, and he also signed, to some extent in blank, a hire-purchase agreement. He also signed a blank order-form in which the amount was to be inserted, and a car delivery receipt in which it was stated that it was only signed by the hirer when delivery of the vehicle was taken. The reason why that transaction did not go through was, I think, because of the delay in getting the car from the manufacturers.

These transactions are perfectly well understood now, because in the last 10 or 12 years hire-purchase finance agreements of all kinds have been made. A man who wants a car negotiates with the dealer, the shopkeeper, who sells cars. The dealer wants the money, and the customer wants to pay by instalments. To enable that to be done, the dealer approaches the hire-purchase corporation. They agree to buy the car from the dealer, or, rather, to pay him for the car the sum which, together with the deposit, the intending customer is willing to put up. Very often the deposit is nothing more than the allowance on a second-hand car. To the agreed price for the car something has to be added. Then the instalments are arranged, and the customer enters into an agreement direct with the hire-purchase finance corporation. They are the buyers of the car from the dealer. In the present case, the first transaction not having gone through, and the documents not having been completed, Dunns Motors, Ltd., on Feb. 1, 1936, wrote to Mr. Wheatley :

> We have just heard from the works that your chassis is ready for collection, and we shall be glad if you will kindly let us know where you wish to have same delivered, so that the body may be made and fitted, or would you care to collect it from the works yourself and take it to the body builders ?

What that means is that the transaction contemplated was for the purchase of a Luton van, whatever that may be. That is the vehicle described in the November proposal. Mr. Wheatley, either because he thought he would get delivery more quickly or for some other reason which does not matter, decided to have what is called a platform body. Dunns Motors, Ltd., were perfectly willing that that should be arranged. It is clear from the correspondence that, instead of buying a complete car from the makers, they were going to get a chassis and have a body fitted to it, and that Dunns Motors, Ltd., were going to pay for that to be done.

It was arranged between Dunns Motors, Ltd., and Mr. Wheatley that he should collect the chassis from the makers. However, that did not alter the position in any way. Of course, the plaintiffs had been approached for the money, and on Feb. 10, 1936, there is this letter from them :

> Dear Mr. Langdon, Following my telephone conversation with you to-day, I enclose herewith cheque value £285 in favour of Dunns Motors, Ltd., in settlement of the above transaction. [Then the figures are set out.] So that you may have a record of the actual figures, this cheque is made up as follows : Revised cost of vehicle, £445, less initial deposit, £110, £335 ; less £50 held by our company ; total £285.

They were not going to pay the full price to Dunns Motors, Ltd., until a certain number of the instalments was paid. The letter goes on :

> This £50 to be repaid to Dunns Motors as to £25 after 12 rentals have been satisfactorily paid, and the remaining £25 after 18 rentals have been satisfactorily met. In view of the alteration of the figures, don't you think it would be better to have a fresh set of documents completed, and I am sending you herewith the original set. You will note that I have typed in the additional cl. 12a, giving us a lien on the body, which I understand from you the hirer is fitting himself, and would ask you to see that this clause is duly initialled by Mr. Wheatley.

Therefore the head office sent to the office which was dealing with this particular transaction the original documents which had been prepared in November. These documents were, as I say, not for a 1936 Commer car at £445, but for a 1935 Commer car at £485. That letter was followed by the letter on Feb. 13, 1936, from the Mercantile Union Guarantee Corporation, writing from their Yeovil office to their Cheltenham office :

> I duly visited Dunns Motors, Ltd., and tendered a cheque in settlement. I have in my possession a complete new set of documents, together with their invoice.

That, I suppose, means the invoice by which Dunns Motors, Ltd., invoiced the car to the plaintiffs. Then the letter continued :

> In my conversation with you over the telephone I advised you that Messrs. Dunns gave me to understand that in view of the delay which had taken place in delivery the client had accepted the chassis and was fitting his own body. Now I

> am informed that this is not strictly correct. What has happened is as follows: Dunns Motors, Ltd., took delivery of the Commer from works, and delivered the chassis direct to Mr. Wheatley at Wembley. They—Dunns Motors, Ltd.—have placed an order with a body-builder at Wembley to make and fit a body to Wheatley's instructions, the account for which will be forwarded direct to Dunns Motors, Ltd., and they will pay. It will therefore be seen that the whole transaction is being carried through by them and not just the chassis supplied, as I was previously informed. I trust I am correct in not forwarding the agreement to Mr. Wheatley in connection with the proposed insertion of clause 12a. Dunns Motors, Ltd., did not take details of engine and chassis numbers when the chassis was handed over, and this information was requested in a letter sent to Mr. Wheatley yesterday. I will retain the documents here till they are complete in this respect.

That letter was written on Feb. 13. On a date which I think must have been, according to this set of documents, Feb. 13—it may have been late in January, or the early part of February—the hire-purchase agreement—that is to say, the proposal for the hire of this particular car chassis, the number of which was 76,109, and the engine number of which was 15,023, a car the 1936 price of which was £445—was filled in. Those particulars were also included in the hire-purchase agreement, and those were filled in some time before Feb. 11. Perhaps I had better say, in case this matter goes further, that the action has been tried before me without evidence on either side, except what is contained in the documents, and it is on that material—and it is quite enough—that I am deciding the case. On Feb. 11, the cheque was actually paid over.

In those circumstances, the only inference one can draw is that Dunns Motors, Ltd., intended at that time to pass the property in the car to the Mercantile Union Guarantee Corporation, Ltd. The plaintiffs could have refused if they had liked, and could have said: "No, we are not going to have anything to do with this, nor part with our cheque until the vehicle is complete." But, knowing that the chassis was having this body put on it, they were willing to take the risk, and to pay for the car. From the time when the car was complete, the car belonged to the plaintiffs, and not to anybody else.

The next matter of any materiality after the payment of the cheque was that, on Mar. 8, the body was completed, and the body-builders handed over the car to Mr. Wheatley. I agree that Mr. Wheatley's obligation and his liability, so far as he was concerned in this contract, began to run from Mar. 8. This agreement was dated Feb. 7, and the date from which the instalments were to run was the date on which the first instalment had to be made—namely, Mar. 8. In view of this misunderstanding about the body, the true date from which this agreement ran was Mar. 8, and, if that became material, the court would rectify the document by inserting the true date. But I do not think that that is in the least material, because, as soon as Mr. Wheatley put this consideration before the plaintiffs—it is true that they said they did it without prejudice—they agreed that the first instalment should not be due until Apr. 8. Apr. 8 came, and Mr. Wheatley paid that instalment. But he did not pay the instalments with any regularity, and by June he had got two months in arrear. At some time in September, as Mr.

Wheatley had not kept up the instalments, and as he had not kept various other promises which he had made, the plaintiffs exercised the right which they had under the hire-purchase agreement. On Sept. 16 they terminated the hiring and possessed themselves of the car.

Mr. Wheatley's defence, although it has no merits, is none the less one which he is entitled to raise if he can make it good. He says: "I am not under any liability. It is true that I did buy this car at some time, and it is true that I regarded myself as under a hire-purchase agreement." I know he had paid the £110, or been allowed that, but he says: "This case is governed by the decision in *Karflex, Ltd.* v. *Poole* (1), and I am entitled, as I understand it, not only not to have to pay anything, but also to recover back all I have paid, because the plaintiffs have no title to the car." Mr. Lawrence made every conceivable point that could be made for Mr. Wheatley, but I do not think that there is any defence at all. I put to Mr. Lawrence the question: "Who do you say is the owner of the car?" Mr. Lawrence was not able to give a very satisfactory answer to that, because, in my judgment, it is perfectly clear that, from and after the date when this car came into Mr. Wheatley's possession, which is all that matters, the plaintiffs were the owners of the car, and no one else was the owner of the car. They have bought it and paid for it, and it is theirs.

Mr. Lawrence cited *Karflex, Ltd.* v. *Poole* (1), but the point for consideration there was a different one from that in this case. The plaintiffs could not have been the owners of the car on Feb. 7, which is the date that this hire-purchase agreement purports to bear. I think that it was a date some time later, but the mere date does not matter, because the court can rectify the date if necessary. *Karflex, Ltd.* v. *Poole* (1), a decision of the Divisional Court to which I was a party, was an entirely different case. There a hire-purchase company, in perfect good faith, bought the car, and, in the same way as has been done here, let it out on hire to the defendant. Then, before any instalments had become due, it was found out that the person who had sold the car to the hire-purchase company had no title to it. He had stolen it, and had sold it to the hire-purchase company, which, although they bought it in good faith, obtained no title to the car. Therefore, in that case the plaintiffs were purporting to let to Mr. Poole something which was not theirs to let. The true owner said: "You have got my car; I want it back." The Divisional Court held that, in those circumstances, Karflex, Ltd., could not retain the car, on the ground that they were not in a position to warrant themselves to be the owners of the car.

I adhere to every word which I said in *Karflex, Ltd.* v. *Poole* (1). When a person lets goods on hire-purchase, it is a condition that, at the time when he lets them, he is the owner of the property in question. It is true that ACTON, J., the other judge sitting with me, at p. 262 used the expression "at the time of the signing of this agreement," but I do not think that there was any difference between ACTON, J., and myself on that point. What we both emphasised was that the material time was when the bailment took place, not the actual moment of signing the agreement. If there has been any misunderstanding about the matter, I desire at once to say that I did not intend the words in my judgment to apply, nor do I think that they in terms do apply, to such a case as this. A man goes to another and says: "I should like to buy a particular piece of machinery, or a particular vehicle, on hire-purchase. I cannot put down the money. The dealer will not sell it except for cash. Will you go and buy it for me?" To this the other man agrees, and he makes out a hire-purchase agreement, which is then and there signed. After the agreement is signed, the man goes and buys the machine, and bails it to the person who wants to get it on hire-purchase. I see nothing wrong in that, and I do not see that the transaction is void in any form. At the time when the person whom I call the customer gets the machine, he gets it from a man who has a perfect right to it. But in *Karflex, Ltd.* v. *Poole* (1) the customer got it from a man who had no power to deal with it.

I think that it is perfectly clear that the plaintiffs in this case were entitled to give the car to Mr. Wheatley at the time they gave it to him, in Mar., 1936. The existence of the hire-purchase agreement is recognised in the correspondence between Mr. Wheatley and themselves. He writes about it, and makes payments under it. I think that it is a perfectly valid agreement. There is no question with regard to the amount of money, because it has been agreed that, if the plaintiffs are right, the sum to which they are entitled is £177 3*s*. 11*d*., and for that sum I give judgment for the plaintiffs, with costs.

Solicitors: *G. H. Drury* (for the plaintiffs); *Alexander Fine, Hawkins & Co.* (for the defendant).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

BIBL.
LONDIN
UNIV.